TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, [redacted]

[redacted] 39

THE UNITED STATES, APPELLANT,

vs.

CALIFORNIA REDWOOD ASSOCIATION, CORPORATION,

[redacted] 40

CALIFORNIA REDWOOD ASSOCIATION, CORPORATION,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 278.

THE UNITED STATES, APPELLANT,

vs.

CALIFORNIA BRIDGE AND CONSTRUCTION COMPANY.

No. 279.

CALIFORNIA BRIDGE AND CONSTRUCTION COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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1 Court of Claims. No. 29916.

CALIFORNIA BRIDGE AND CONSTRUCTION COMPANY,
vs.
THE UNITED STATES.

I. *Petition and amended petition.*

On December 17, 1906, the claimant filed its original petition. Subsequently—to wit, on February 13, 1913—the claimant, by leave of court, filed its amended petition in lieu of said original petition, which is as follows:

To the Honorable the Court of Claims:

The claimant, California Bridge and Construction Company, respectfully represents:

The claimant is a corporation organized under the laws of the State of California. On the 24th day of October, in the year 1898, the United States, represented by Rear Admiral Mordecai T. Endicott, United States Navy, Chief of the Bureau of Yards and Docks of the Navy Department, advertised for bids for the construction of a sawmill, boiler house, and steel chimney at the navy yard at Mare Island, California, on plans and specifications which were, by said advertisement, to be exhibited to intending bidders at said navy yard, where also further information was, by said advertisement, to be furnished. The claimant applied for copies of the plans and specifications, and the same were sent in response to its inquiries both by the commandant of the navy yard at Mare Island, California, and by the Bureau of Yards and Docks at Washington. The claimant, after receipt of said plans and specifications, by its president and also by its secretary and treasurer, visited the navy yard at Mare Island, inquired for the site of said sawmill, boiler house, and steel chimney, and there was there pointed out and exhibited to said officers of the claimant company a site duly staked out for the work, which said officers of the claimant company fully examined.

Thereafter, within the time limited by said advertisement, the claimant submitted, in proper form, a proposal for the work, and thereafter said proposal was accepted, and the contract duly entered into with the United States, on the 21st day of December, 1898, for the construction of the work described in said advertisement, plans and specifications, for the price of fifty-five thousand nine
2 hundred and thirty-nine dollars ($55,939), a copy of which contract and specifications, marked Exhibit X, is annexed hereto. Subsequently, to wit, on the 31st day of March, 1899, a supplemental contract was executed by and between the same parties, a copy of which, marked Exhibit Y, is annexed hereto. Both of said exhibits are prayed to be taken and read as a part hereof.

By paragraph 7 of the specifications, the contractor was required to commence the work within twenty (20) days from the date of

signing the contract, to continue the same without interruption, and to complete the entire work in six calendar months from the date of the contract. In accordance with this provision, the claimant, within twenty days from the date of the contract, brought material on the ground and prepared to begin work in the performance of its contract, but was then, for the first time, informed that it had been decided not to construct said sawmill, boiler house, and steel chimney on the site staked out and which had been exhibited to and examined by the president of the claimant company before bidding as aforesaid, but that it had been decided to construct said sawmill, etc., at another location not yet determined; whereby the claimant was prevented from beginning work as required by its contract, and delayed, at great expense.

On the 1st of March, 1899, and not before, it was announced that a site had been determined upon, said site being at a location on the edge of the water between high-water and low-water mark and partially submerged in certain stages of the tides. The material at said site was soft mud, requiring much longer piles than those which would have been required at the site originally shown to the president of the claimant company, and much deeper driving of said piles, and was in all respects a more difficult and expensive site to build upon, than the site originally selected and shown. The claimant thereupon promptly protested against the change of site as a violation of the contract, and objected to proceeding on the new site without increased compensation for the differences of difficulty and expense in building thereon. Much correspondence ensued between the claimant, on the one hand, and the officers of the United States, both the local officers at said navy yard and the Bureau of Yards and Docks, and the Department of the Navy at Washington.

Meanwhile, the claimant brought on the ground material to the value of $16,688.97 and under the provisions of the contract for partial payments, received payments thereon amounting to $15,434.32, leaving material to the value of $1,254.65 unpaid for and for which no payment has been received to the present time. The claimant also brought on the ground in readiness for beginning work a large quantity of tools and machinery which, owing to the delay in regard to the site and to the subsequent delays, greatly deteriorated in value, and the use of which was lost to the claimant during that time; and employees were required to take care of said plant whose wages became a total loss to the claimant.

The Government, however, failed to offer to the claimant any acceptable arrangement or agreement for proceeding with the
3 work at a different site from that contracted for, and finally, after much delay, the Chief of the Bureau of Yards and Docks, acting for the Secretary of the Navy, on the 2d day of January in the year 1901, notified the claimant and its sureties that the con-

tract was annulled, and that the work would be readvertised and relet; and said Chief of the Bureau of Yards and Docks subsequently did readvertise and relet the work and refused to allow the claimant to proceed with the construction at the site originally staked out and shown to the claimant as the site for the work; and the Government also took possession of all the material which had been brought on to the ground as aforesaid, consisting of a large quantity of broken stone, structural steel, lumber, flooring, and granite, whereby the claimant lost the value of said material over and above the partial payments already made for the same as aforesaid, and also lost all the profits which it had anticipated from its contract, and which it would have made but for the refusal of the United States to permit it to proceed to construct the buildings contracted for on the site exhibited and shown to its president, and upon which the United States should have allowed said buildings to be constructed.

By reason of the violations of the contract as aforesaid, the claimant has sustained the following damages, which it claims:

Cost of materials, including carriage	$16,688.97
Less partial payments thereon	15,434.32
Net loss on materials	1,254.65
Use, deterioration, freight, and repairs of and on plant and tools assembled for the work	3,314.91
Amount carried forward	$4,569.56
Amount brought forward	$4,569.56
Wages of men employed in sending to and delivering at Mare Island plant and materials, and caring for same there	545.41
Time and expenses of officers and employees of claimant	3,004.80
General and office expenses of claimant chargeable to this contract	1,068.50
Cost of changing location of material by order of the engineer, because of the delay	51.00
Cost of testing foundations of both sites	998.15
Anticipated profits	7,066.00
Total	$17,303.42

The United States, defendants herein, on the 28th day of February, A. D. 1903, brought their action of assumpsit in the United States Circuit Court for the Eastern District of Pennsylvania against this claimant, and also against the American Surety Company of New York, Albert Brown, and Thomas Prather, as defendants, said action being number 80 of October session 1902, in said court, which action was upon the same cause of action as the counterclaim now pleaded by defendants herein; and the said surety company, Brown, and Prather were sued in said action solely because they were sureties on the bond of the defendants for the faithful performance of the contract (Exhibit X) now in suit. The American Surety Company of New York was the only one of the defendants in said action who was served; but the claimant had notice thereof and the president of the claimant company

appeared and testified in said suit. Said surety company pleaded non assumpsit, and based its defense on the action of the United States in assuming to change the contract by changing the site where the structures contemplated by the contract (Exhibit Y) were required to be erected, to which change said surety company had not consented. In fact, neither claimants nor their sureties ever consented to such change. On the 15th day of November, 1906, the said action came on to be tried, and the court, by its charge, submitted to the jury the question whether under the contract (Exhibit X) and the circumstances attending its execution the United States could require claimant to erect the structures contemplated by the contract (Exhibit X) at a site at the Mare Island Navy Yard other than the site pointed out to claimant's officers, as hereinbefore set forth. The jury brought in a verdict for defendants in said action, and judgment was entered accordingly in favor of said surety company; and subsequently, to wit, on the 20th day of November, 1906, the United States, plaintiffs therein, moved for a new trial, which motion was subsequently, to wit, on the 7th day of December, 1906, overruled by the said court, from which action no appeal or writ of error was taken by the United States.

In consequence of the foregoing, claimant avers that defendants herein ought not to be admitted to allege, and are estopped from alleging, that under the contract (Exhibit X) and the circumstances attending its execution the United States could require claimant to build the structures contemplated by the contract (Exhibit X) at a site at the Mare Island Navy Yard other than the site pointed out to claimant's officers as hereinbefore alleged.

No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant asks judgment for seventeen thousand three hundred three dollars and forty-two cents ($17,303.42).

KING & KING,
Attorneys for Claimant.

STATE OF CALIFORNIA,
County of Alameda, ss:

A. Ray Burrell, being duly sworn, deposes and says: I am the secretary of the claimant company in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

A. RAY BURRELL.

Subscribed and sworn to before me this 5th day of February, 1912.

[SEAL] R. S. MCHENRY,
Notary Public in and for the County of Alameda, State of California.

5 *Claimants' Exhibit X.*

[Duplicate.]

This contract, of two parts, made and concluded this twenty-first day of December, A. D. 1898, by and between the California Bridge and Construction Company, of the city of Oakland, State of California, by Alfred W. Burrell, its president, as principal, and the American Surety Company of New York, a corporation, and Albert Brown, of Oakland, Alameda County, California, and Thos. Prather, of Oakland, Alameda County, California, as sureties, parties of the first part, and the United States, by Mordecai T. Endicott (Chief of the Bureau of Yards and Docks), acting under the direction of the Secreta y of the Navy, party of the second part, witnesseth, that for and in consideration of the payments hereinafter specified, the parties of the first part, for themselves and their personal and legal representatives, do hereby covenant and agree to and with the party of the second part as follows, viz:

That they, the said parties of the first part, will provide, furnish, and deliver, at their own risk and expense, at the United States navy-yard, Mare Island, California, all the necessary materials and labor, tools, and appliances for the construction and completion, in all respects, of sawmill, boiler house, and steel chimney, and shall construct and complete the same within six calendar months from the date of this contract in strict accordance with, and subject to, all the conditions and requirements of the plans and specifications appended hereto, and which form a part of this contract, for the sum of fifty-five thousand nine hundred and thirty-nine dollars ($55,939.00).

It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Member of
6 or Delegate to Congress, nor any officer of the United States, naval, military, or civil, is, or shall be, admitted to any share or part of this contract or to any benefit to arise therefrom; that any transfer of this contract, or of any interest therein, to any other person or party than said parties of the first part shall annul this contract so far as the United States are concerned; and that if said parties of the first part shall fail in any respect to perform this contract on their part, it may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults herein, or violations hereof; and that for such default the United States may demand and recover of said parties of the first part, and their representatives aforesaid, as liquidated damages, a sum of money equal to the penalty of the bond forming part of this contract.

And it is further agreed by the parties of the first part that they will protect and defend the party of the second part in the full and

free use and enjoyment of any and all patent rights to any invention, machine, or device which may be applied as a part of the work herein specified and contracted for, either in its construction or use after completion, against the demands of all persons whomsoever.

And it is further agreed that if during the progress of the work it shall be deemed by the Government necessary or desirable to make any changes or modifications in the plans and specifications affecting the cost, said changes or modifications and the increased or diminished compensation to be paid the contractor must be agreed to in writing by the parties to the contract before the same is begun; and such increased or diminished compensation based upon the actual cost, and when exceeding $300 shall be assessed by a board of naval officers, appointed for the purpose.

And this contract further witnesseth that the United States, party of the second part, in consideration of the foregoing stipulation, do hereby covenant and agree to and with the parties of the first part, and their said representatives, as follows, viz:

That for and in consideration of the faithful performance of this contract by the parties of the first part, duly certified to by the inspecting officer appointed for that purpose by the Secretary of the Navy, and the acceptance of the work as satisfactory on the part of the United States, there shall be paid to the said parties of the first part, for the full and entire completion of the said sawmill, boiler house, and steel chimney the sum of fifty-five thousand nine hundred and thirty-nine dollars, upon approved bills properly certified and drawn in the usual manner, and payable at such navy pay office as the parties of the first part may elect, within ten days after warrants for the same shall have been passed by the Secretary of the Treasury, and in the following manner, viz:

At the end of each month the officer in charge of the work shall make an estimate of the amount of material furnished and work done. Upon this estimate will be based a voucher for the payment of material and work done during the previous month. This voucher will be submitted to the commandant for his approval, and after the approval of the Chief of the Bureau of Yards and Docks the contractor will be paid the amount of the voucher, less 10 per cent reserved, by the pay officer in charge of the navy pay office at San Francisco, Cal.

7 It is mutually understood and agreed, as aforesaid, that no payment or allowance to said parties of the first part will or shall be made by the United States for or on account of this contract except those payments herein specified; that ten per cent will be withheld from the amount of each payment herein stipulated, as securitiy for the full completion and performance of their covenants and agreements by the said parties of the first part; and that ninety per cent of each of said payments shall be made within ten days after a warrant therefor shall have been passed by the Secretary of the Treasury.

In witness whereof the said parties hereto have hereunto set their hands and seals at Oakland, this twenty-first day of December, A. D. 1898.

CALIFORNIA BRIDGE & CONSTRUCTION CO., [SEAL.]
By ALFRED W. BURRELL, *President.*
ALBERT BROWN. [SEAL.]
THOS. PRATHER. [SEAL.]
MORDECAI T. ENDICOTT, [SEAL.]
Chief of Bureau Yards & Docks.
AMERICAN SECURITY COMPANY OF NEW YORK, [SEAL.]
By S. G. MURPHY, *Resident Vice-President.*
CHARLES R. SHURTLEFF,
Resident Assistant Secretary.
JAMES R. SAMISS, *Resident Manager.*

Signed and sealed in presence of—
W. A. SMITH, as to Cal. Bridge & Construction Co.
J. PORTER, as to American Surety Co.
W. L. PRATHER, Jr., as to Brown and Prather.
WM. M. SMITH, as to M. T. E.

Specifications for the construction of sawmill, boiler house, and steel chimney at the U. S. Navy Yard, Mare Island, Cal.

Act approved May 4, 1898.

1. The work embraced in these specifications consists of furnishing all labor and material to build in the best and most workmanlike manner a sawmill, 192 by 61 feet, center to center; boiler house, 48 by 48 feet, center to center, and steel chimney, 62 feet 6¼ inches high, with a 2-foot 6-inch flue. The buildings are to be of steel-frame construction, with walls filled in of brick, roof of slate and skylights made of translucent fabric. The details of construction are shown on drawings B-216, foundation plan; B-217, basement plan; B-217, first-floor plan; B-219, second-floor plan; B-220, elevation plan and details of steel chimney; B-221, elevation and sections; B-222, ½-inch scale details; B-223, ½-inch scale details. The above-mentioned drawings, together with these specifications, are to be considered a part of the contract.

GENERAL CONDITIONS.

2. Facilities.—The station authorities are to allow the contractor proper space at the station for landing and storing material to be used in the construction of a sawmill, boiler house, and steel
8 chimney. After the completion of the sawmill, boiler house, and steel chimney, and before acceptance by the Government, the contractor shall remove all material, machinery, etc., from the station.

3. Patents.—The use of all patented articles and methods employed in the construction of the sawmill, boiler house, and steel chimney is

to be included in the contract without any additional charge or expense to the Government.

4. Intention.—It is the declared intention and meaning of the contract to obtain a complete and substantial sawmill, boiler house, and steel chimney, according to the general plans and specifications, to the entire satisfaction of the Chief of the Bureau of Yards and Docks. Any omission from either plans or specifications of the details of the work the performance of which is necessary to the construction, of which the officer in charge of the work shall be the judge, shall be done by the contractor as though fully described and shown and without additional expense to the Government. Where a difference between plans and specifications exists, the specifications shall govern as to the true intent and meaning.

5. Control of work.—The Government shall at all times, by its officer in charge, have full direction and oversight of all work done under these specifications, and in all cases of dispute as to their intent and meaning the decision of the officer in charge, approved by the commandant, shall be final, subject only to the action of the Chief of the Bureau of Yards and Docks.

6. Labor.—If at any time it shall appear to the officer in charge of the work that any person employed on the work is incompetent, careless, reckless, or disorderly, that person shall be discharged upon the requisition of the officer in charge of the work, and he shall not again be employed upon the work. The like shall apply to anyone who disobeys or evades instructions.

7. Time of commencement of work.—The contractor shall commence the work within twenty days from the date of the signing of the contract and continue without interruption. The entire work to be completed in six calendar months from the date of contract.

8. Progress of work.—If at the close of any month the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the officer in charge of the work shall so report to the commandant, and the Government shall have the power to refer the matter to a board of three officers, and, if recommended by them, and the interests of the Government so require, the Government shall have the right to annul the contract and complete the work in such manner as is deemed best, at the expense of the contractor and his sureties.

9. Unavoidable delays.—When an unavoidable accident, storm, or other act of Providence occurs, by which the progress of the work is or seems likely to be delayed, the contractor shall immediately notify the officer in charge of the work of the occurrence in detail, in writing, and state in what way and to what extent it will delay the fulfillment of the contract, in order that the necessary investigation may be made. If sufficient cause is found, an extension of time will be granted and made a matter of record. It is clearly understood that, unless it be done whenever such a thing occurs, no subsequent application for extension of time for the completion of the contract on account of such occurrence will be granted.

9 10. Avoidable delays.—Should the progress of the work be delayed by anything but unforeseen and unavoidable accidents, storms, or other acts of Providence, or by action of the Government, no application by the contractor for an extension of time will be favorably considered, except on the condition that the contractor make good any deterioration caused by such delay and bear the additional cost of supervision and inspection by the Government, and other expenses caused by the failure of the contractor to fulfill his contract with the United States according to its terms; and on granting the extension of time asked for there shall be reimbursed to the United States by the contractor the amount of such additional cost and expenses, to be deducted from any money that may be or may become due him from the United States under his contract, the difference only to be paid him upon his receipt.

11. Authority for the extension of time.—No extension of time for completion of work will be made except upon the written authority of the Secretary of the Navy.

12. Deductions for delay.—In case the completion of the work shall be delayed beyond the time fixed upon for the completion of the contract, deductions of $25 per day as liquidated damages during such delay may in the discretion of the Secretary of the Navy be made from the contract price of said work.

13. Extras.—All expenses of every description that may be incurred in the prosecution of the work must be covered by the contract price. All extra or additional work will be made the basis for a supplemental contract, and such contract must be properly executed before additional or extra work is done.

14. Changes.—Should it be to the interests of the Government to make any changes in the plans and specifications exceeding $2,000 in value, the increased or decreased compensation to which the contractor may be entitled is to be determined by a board of three naval officers, and the contractor shall be bound by its decision, if the decision of the board is approved by the Chief of the Bureau of Yards and Docks, and no further payments shall be made until its decision, so approved, shall be accepted by the contractor in writing. Changes in plans and specifications not exceeding $2,000 in value may be made by mutual agreement in writing, approved by the Chief of the Bureau of Yards and Docks.

15. Responsibility of the Government.—The United States will not be responsible for any damage that may occur to the contractor's plant, or other property whatever, during the progress of the work, and he must assume all risks of storm, fire, damage to person or property, and casualties of every description.

16. Inspection.—The officer in charge of the work shall have the power to reject any material which is not in accordance with the requirements of these specifications and drawings; and all rejected material will at once be removed by the contractor and be replaced without delay with satisfactory material.

17. Contractor's representatives.—The contractor or a responsible representative shall at all times be on the work to see that it is properly carried on and to receive directions from the officer in charge of the work.

18. Proposals.—Each proposal must be accompanied by a certified check, payable to the Chief of the Bureau of Yards and Docks, for the sum of $1,000, as a guarantee that the bidder will, within fifteen days after notice of the acceptance of his proposal, execute the required contract and give bond in a penal sum equal to 20 per cent of the contract price, conditioned for the faithful performance of the contract.

19. Return of certified check.—Checks of unsuccessful bidders will be returned to them by registered letter immediately on the awarding of the contract. Check of the successful bidder will be returned to him immediately upon the execution of the contract.

20. Payments.—At the end of each month the officer in charge of the work shall make an estimate of the amount of material furnished and work done. Upon this estimate will be based a voucher for the payment of material and work done during the previous month. This voucher will be submitted to the Commandant for his approval, and after the approval of the Chief of the Bureau of Yards and Docks the contractor will be paid the amount of the voucher, less 10 per cent reserved, by the pay officer in charge of the Navy Pay Office at San Francisco, Cal.

21. Schedule of prices.—After the signing of the contract, and before commencement of work, the contractor will submit to the officer in charge of the work a schedule of prices for material furnished and for material furnished and worked into place. This schedule, after approval by the officer in charge of the work, will be made the basis of monthly payment.

22. Plans and drawings.—When the contractor begins work from a drawing, whether furnished by himself, the Bureau of Yards and Docks, or the officer in charge of the work, he is presumed to have checked it over and becomes responsible for errors in fittings and lengths.

23. Lines and levels.—The contractor will be held responsible for lines and levels of his work, and will be required to so frame the material that all will come together true and tight.

MATERIAL AND WORKMANSHIP.

24. Round piles.—The round piles are to be of douglas fir, straight, free from large, loose, or rotten knots, falling or wind shakes, or other defects affecting their strength; they are to be from 8 to 10 inches at small end and 14 to 18 inches at the butt; they are to be of sufficient length so that when driven the penetration shall not exceed an average of ½ inch per blow for the last five blows of a hammer weighing 3,000 pounds falling 20 feet, or the equivalent thereof. After being driven and cut off, the head of the pile is to be solid

and sound and show no indication of brooming or splitting; piles that do not come up to the above specifications as to quality or driving are to be replaced with additional piles without any additional cost to the Government; piles which are driven and are not satisfactory are to be pulled up if the officer in charge so directs.

25. Concrete.—Concrete shall be composed of Portland cement, sand or gravel, and broken stone, in the following proportions: Cement one, sand or gravel three, broken stone five. The concrete shall be mixed in the following manner: The sand is to be measured and laid on the mixing board; on this will be placed the cement; sand and cement will be mixed until thoroughly incorporated dry; this will require turning over about three times; after being mixed dry it will be wet, and a mortar made of proper consistency; this mortar will be placed upon the rock, which has been previously measured, and placed upon the mixing board; the mortar and rock will then be thoroughly incorporated; this will necessitate its being turned over not less than three times in the proper manner; after being mixed it will be wheeled to and dumped at the place of deposit, care being taken that the batch mixed will not be so large but that it can all be placed and rammed before the initial set has taken place; the concrete will be deposited in layers not to exceed 9 inches in thickness, preferably two layers of 4½ inches each will be carried on at the same time, one layer a little in advance of the other; each layer to be thoroughly rammed with heavy iron rammers, especially adapted for the purpose, until it forms a perfectly compact mass; and concrete mixed a sufficiently long time to commence setting before being deposited and rammed is not to be used. The whole method of mixing, placing, and ramming the concrete will be done to the entire satisfaction of the officer in charge of the work and as he directs; when placed and rammed, all wheeling or walking on concrete must be prevented for at least twelve hours after being deposited, or longer if the cement used is slow setting and it is found that the concrete has not taken a good set; concrete will not be allowed to be laid in water.

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26. Portland cement.—Portland cement is to be finely ground and free from lump; 90 per cent to pass through a seive of 6,400 meshes per square inch, and shall show after being mixed neat seven days, one day in air and six days in water, 400, 45, and 2,000 pounds, tensile, transverse, and crushing strength, respectively, per square inch.

27. Sand.—Either sand or gravel can be used, preferably gravel of size approved; gravel to be clean, and acceptable to the officer in charge of the work; sand to be clean and coarse, acceptable to the officer in charge of the work; salt-water sand will not be used in brickwork.

28. Broken stone.—The broken stone is to be of sufficient size to pass through a 2-inch ring; it shall be hard and free from dust or dirt; it shall be acceptable to the officer in charge of the work.

29. Back filling.—Back fill all work as soon after construction as possible.

30. Granite.—Granite will be used where shown. It will be of approved quality and color, free from sap, seams, or shakes; dressing will be six-cut work; beds rough pointed.

31. Bricks.—Bricks to be hard-burned "selected," of best quality red brick, uniform in color, size, and form. Arch or salmon brick will not be allowed. Bats to be used only as closures. Sample of brick to be used will be submitted to the officer in charge before delivery.

32. Slate.—Slate to be of best quality, subject to the approval of the officer in charge, 20 by 10 by ¼ inch, drilled and countersunk.

33. Fire brick.—Fire brick to be first quality, subject to the approval of the officer in charge of the work.

34. Sugar pine.—Sugar pine will be used where shown: it will be clear and dry.

35. Douglas fir.—Douglas fir to be No. 1 merchantable, except where specified differently. All finish, finish floors, floor to brows, will be clear, vertical grain, steamed and kiln-dried, except
12 floors to brows, which need not be steamed or kiln-dried; and first-story floor need not be steamed.

36. Spruce.—Spruce to be used for strips on roof, and to be merchantable.

STRUCTURAL STEEL.

37. Kind.—All structural steel shall be made by the open-hearth process.

38. Inspection.—All tests and inspection shall be made at the place of manufacture before shipment. Each piece to bear inspector's mark.

39. Test pieces.—The tensile strength, limit of elasticity, and ductility shall be determined from standard test pieces cut in the presence of the inspector, from the finished material of each heat, and planed, milled, and turned parallel, and have a cross section of at least one-half square inch; and the elongation shall be measured upon an original length of 8 inches, except when the thickness of finished material is five-sixteenths of an inch or less, in which case the elongation shall be measured in a length equal to sixteen times the thickness. Two test pieces shall be taken from each blow, one for tension and one for bending.

40. Defects and finished pieces.—Finished bars, plates, and shapes must be free from injuries, seams, flaws, or cracks, and have a workmanlike finish.

41. Strength.—The structural steel used (except for rivets) shall have an ultimate tensile strength of 60,000 to 70,000 pounds per square inch, an elastic limit of one-half the ultimate strength, and a minimum elongation of 22 per cent in 8 inches; and must stand bending 180° without sign of fracture, to a curve the inner radius of which equals the thickness of the piece tested, both cold and after being heated to a cherry-red color, and then quenched in water at 60°

F.; and have a reduction in area of not less than 40 per cent at the point of fracture.

42. Rivet steel.—All rivets must be of steel, having an ultimate tensile strength of 52,000 to 62,000 pounds per square inch, an elastic limit of not less than 30,000 pounds per square inch, and an elongation of not less than 25 per cent in 8 inches, with a reduction of area of not less than 50 per cent at point of fracture, and stand bending 180°, and close down upon itself without sign of fracture. Specimens must stand cold hammering to one-third the original thickness without flaying or cracking.

43. Tension rods.—Rods in tension must have threaded ends upset, so that the diameter at the base of thread will be greater than that of the bar before upsetting.

44. Pins.—Pins shall be made from same steel as that designated structural steel, and on specimen test pieces cut at a depth of 1 inch from surface of finished material, fill the same physical requirements for ultimate strength, elastic limit, and bending, but the required elongation shall be increased 5 per cent.

45. Variation in weight or cross section.—The variation in weight or cross section of more than 2½ per cent from that specified will be sufficient cause for rejection.

46. Steel for chimney.—The plates of which the chimney is to be built will be open hearth, containing a quantity of phosphorus
13 not greater than 0.06 per cent; tensile strength will be between 54,000 and 62,000 pounds per square inch; the elongation of not less than 26 per cent in 8 inches; the fracture to be of a silky texture, the elastic limit not to be less than one-half of the ultimate strength.

47. Cast iron.—Castings to be of good quality iron, clean and smooth, free from all defects, such as sand and blowholes.

48. Hardware.—Hardware to be approved by the officer in charge of the work.

49. Excavation.—Excavate for all piers, foundations, and footings where shown as necessary. Excavation to be large enough for removal of cribbing; excavated earth to be deposited where directed by the officer in charge of the work.

50. Concrete work.—The concrete piers for steel columns and arched footings for walls are to be carried up in conjunction with each other to the height of cement floor. Column piers to be carried up to height of bedplate. After placing of columns the concrete is to be carried up to finished heights as shown. All steel work where in concrete to be entirely covered and inside of columns filled with concrete. The 6-inch topping of column piers is not to be put on until the entire steel structure is erected, when bolts are to be cinched up and tops put on. From concrete arch to top of concrete retaining walls is not to be built until all steel work is completed.

51. Foundations for brows and steps.—Build foundations for brows as shown on plans, all to be brought up to true levels and exposed faces neatly trowel finished.

52. Arches in foundations.—Arches to be formed in accordance to patterns, of radii shown on detail drawings.

53. Concrete forms.—Concrete forms to be substantial, to keep forms to measurements, and are to be tolerably tight. Where necessary, they must be properly braced to keep from spreading.

54. Anchor rods.—The anchor rods for columns and posts are to be built in tight and to true patterns and in their exact positions. There will be four rods to each column, anchored to two 18 by 6 by $\frac{1}{2}$ inch plates.

55. Foundation for chimney.—Build foundations for chimney and flue connections, and set anchor rods as shown on drawings.

56. Removal of cribbing.—After completion and setting of concrete the cribbing is to be removed in the presence of the officer in charge of the work, and all defective work repaired as may be directed. All work done satisfactorily is to be back filled immediately.

57. Exposed concrete.—All exposed concrete is to be neatly trowel finished and properly protected during completion of the superstructure.

58. Setting of plates.—The bedplates of all columns and posts are to be set in a bed of one part cement to two parts of sand.

59. Pipe conduits.—Build in terra cotta pipe of sizes required for pipe conduits, where directed by the officer in charge of the work.

60. Mortar for brickwork.—Mortar for brickwork to be composed of five barrels of lime mortar composed of one part unslaked lime to three parts sand, or of a consistency approved by the officer in charge of the work, and one barrel of cement, all by measure. Cement is not to be added to mortar until ready for use in the wall. Mortar on boards must be worked off into the wall before leaving the work every evening. No retempering will be allowed.

14 61. Brickwork.—Brickwork to be shoved work, with $\frac{3}{8}$-inch joints, all well filled. To be laid plumb, level, and true. All joints between brick and steel to be thoroughly filled, and brick to be slipped or cut to fit the steel. Courses to be arranged so that a header course will come on every top plate of beams and under bottom of beams, tees, and angles. Otherwise every fifth course. Cement and lime are to be protected from dampness at all times. Brick is to be properly covered during inclement weather. Bricks are to be laid damp in dry weather and dry during inclement weather. The officer in charge of the work is to decide when work is to be stopped on account of rain.

62. Lines.—All brickwork is to be laid to line, and all projections to be true and straight.

63. Coping courses.—Coping courses of gables are to be laid to pitch of roof and to be laid to lines.

64. Anchors.—Anchors to be brought out from steel frame of gable through brickwork and joints of coping to hold down coping.

65. Face joints.—Face joints, inside and outside, are to be neatly trowel struck.

66. Arches.—Arches are to be laid to centers and soffits to be raked out and tuck pointed on completion.

67. Window sills.—Window sills are to be rowlocks laid in cement mortar composed of one part cement to two parts of sand and to be covered with one-half inch of the same mortar. All to be laid to proper pitch and project 2 inches.

68. Fire brickwork.—Brickwork to be laid in finely ground fire clay; bricks are to be dipped and laid with hammer. After laying, the face of the brickwork is to be covered with thin fire clay put on with a whitewash brush; between the fire-brick lining and steel stack the opening will be filled in with well-burned cinders, or some light material which will withstand heat.

69. Basement floor.—Basement floor to be of concrete of same proportion as foundations. To be 4 inches thick, properly tamped with a ½-inch finish course of one to one cement and sand, trowel finished, blocked and graded, with gutters to take off seepage as directed.

70. Crushed brick.—Lay concrete floor on a 6-inch layer of crushed brick, properly tamped and rolled; old bricks for this purpose will be furnished by the Government and crushed by the contractor at his expense with the yard crusher.

71. Expanded metal floor in boiler house.—Put in No. 16 expanded metal for second floor of boiler house, properly laid and fastened according to directions.

72. Cinder concrete.—Build forms as shown and directed, and put on cinder concrete of proportion of one cement to three of sand and four of well-burned washed cinders, 4 inches thick, properly tamped, and finished off with a ½-inch finished course of one to one. Concrete must strip clean and even on completion. Form for concrete to be dressed lumber.

73. Granite coping.—Wall copings to be 6 by 16 inches, with ¾ by 12 inch wash and 4-inch projection, and to have ¾ by ½ inch drip cut in projection. Outside ends to be 6 feet long and to have starters for top coping worked on. The top coping to be 6 by 24 inches, cut in lengths to suit anchors, which are to fit between joints.

74. Steps.—Furnish and set granite steps where shown; to be set in cement mortar, one to one. Steps to be 7 by 14 inches, to have ¼ by 12 inch wash and plain face. Copings for buttresses to be 7 by 15 inches, with dressed faces, beveled wash, and drip nosings.

75. Basement posts.—Basement posts to be dressed four sides, to be set on base plates properly fitted and secured to each with two ¾-inch bolts with nuts.

76. Bolsters.—Bolsters to be dressed four sides. On top of posts fasten 10 by 12 inch by 4 foot bolsters, secured with one ¾ by 18 inch galvanized-steel driftbolt.

77. Girders.—Girders to be dressed four sides; to be placed on bolsters and to be secured with two ¾ by 20 inch driftbolts to each end where jointed and two bolts to each bolster where not jointed.

78. First-story joists.—Joists to be 4 by 16 inches, spaced as shown on drawings. They are to be butt jointed and toe nailed to girders, with two 20-penny nails to each end, and to have 4 by 16 inch space blocking over girders, spiked with two 6-inch spikes through joists into blocking.

79. First floor.—Flooring is to be 3 by 4 inch dry, vertical grain, Oregon pine, No. 1, clear, dressed four sides; to be grooved and have close-fitting slip tongues, 1 by 1 inch; to be blind nailed through grooves into joists with two 16-penny nails every other joist, and nailed into preceding flooring strip with one 20-penny nail between every fourth joist. All to be driven up tight and wedged up where required.

80. Brows.—Brows to be constructed as shown. The first two panels next to building are to have braces, as shown, on every foundation. Each brow to have a curve of 8 inches. Brow frames are to be spiked to sills, plates, and girders, and driftbolted into posts with 1-inch galvanized-steel driftbolts.

81. Planking.—Planking to be spiked to stringers with two 20-penny nails to each bearing.

82. Curbing.—Curbing to be driftbolted through planking into stringers.

83. Second-story floor joists.—Second-story floor joists to be 2 by 14 inches, sized to an even width, to be spaced 16 inches on centers, approximately. All to be hung in forged stirrups as shown on plans.

84. Stirrups and wall hangers.—Stirrups and wall hangers are to be Van Dorn hangers, or others equally as good, to be approved by the officer in charge of the work. First-story wall hangers to have 4 by 8 by $\frac{1}{4}$ inch heel plates, riveted on bottom of hanger. Second-story stirrups are to have 2 by 20 by $\frac{1}{4}$ inch separators. Wall hangers to be hooked over top plate of connecting beams in gables. Joists to be secured to all hangers by $\frac{3}{8}$ by 3 inch lag screws. Wall hangers in first story to be anchored to wall with $\frac{1}{2}$ by $9\frac{1}{2}$ inch bolts and nuts and 6 by 6 by $\frac{1}{4}$ inch washers every fourth joist. Shoes of stirrups and hangers to be 4 inches wide. Joists butting against columns are to be lag screwed to angle clips and heel plates riveted on columns.

85. Second-story flooring.—Second-story flooring to be as shown and specified, in two thicknesses. The under flooring is to be laid diagonal, with dressed side down, nailed through face with two 8-penny nails to each bearing.

86. Second-story finish flooring.—Second-story finish flooring is to be nailed through chalk lines on under flooring into joists with one 8-penny nail to each bearing. All joints to be driven up tight and left smooth on completion.

16 87. Purlins.—Purlins to be as shown on drawings.

88. Roof boarding.—Roof boarding to be laid diagonal, dressed side down, and to be nailed with two 10-penny nails to each bearing, and to be laid up close to walls and cut to bevel on chalk line on top and bottom.

89. Skylight frames.—Skylight frames to be dressed sugar pine, built as shown on detail drawing, with 5½ by 3¾ inch top and bottom rails, 2¾ by 3¾ inch stiles, and 1½ by 2½ inch and 1½ by 3¾ inch muntins. Frames are to be secured to Z-bar purlins by 1¼-inch roundheaded wood screws with 25 screws to each panel.

90. Top skylight combing.—Top skylight combing to be bolted to upper Z bar with ½ by 7 inch countersunk bolts and round washers every 4 feet.

91. Roofing felt.—Cover the roofs with gray roofing felt weighing 1½ pounds to the square yard; to be lapped 2 inches and nailed down with roofing strips.

92. Roofing strips.—Roofing strips to be 1 by 3 inch rough spruce, nailed every 2 feet with one 6-penny nail, to be 8½ inches on centers, and all to be laid on straight chalk lines.

93. Tilting strips.—Tilting strips to be beveled to suit pitch of starting slate.

94. Door frames.—Door frames to be 1¾ by 8 inches, rabbeted ½ by 1¾ inches with 1½ by 1½ inch brick mold.

95. Doors.—Doors to be 1¾ inches thick, with glass panels, all as shown on drawings. To be Oregon pine.

96. Door casings.—Door casings to be 1 by 6 inches, dressed four sides, with ¾ by 7¾ inch head, square butted.

97. Windows.—Pulley stiles to be 1⅛ by 4 inches, parting strips ⅜ by ½ inch, blind stops ¾ by 4¾ inches, outside head ¾ by 8 inches, sills 2 by 10 inches, backboard ¾ by 4 inches, sash will be 2¼ by 1¾ inches, meeting rails 2¼ by 1¼ inches, bottom rail 3 by 1¾ inches. All sash will be furnished glazed by the Government and are to be hung by the contractor. Side casings, ¾ by 4¾ inches, backed out ¼ inch. Head casings to be ¾ by 7¾ inches. Casings are to form inside of box frame. Rabbeted window stool 1¼ by 2¼ inches, rabbeted ⅜ by ½ inch. Apron 5¾ by ¾ inches, to be cut to full width of casings. Scotia mold under window stool ¾ by ¾ inch. All windows in first and second stories are to be double-hung with heavy copper sash chain of approved pattern, iron weights, and Sargent's 2¼-inch bronze antifriction pulleys. No pockets in windows.

98. Basement windows.—To be hinged casement windows, with 1¾ by 4 inch rabbeted frame, 1½ by 1½ inch brick mold, 2 by 12 inch sill, and casings, stool, and apron same as first and second stories. Sash will be furnished by the Government and fitted and hung by the contractor.

99. Partitions of office part.—Partitions to be built of 2 by 4 inch stuff, sheathed both sides with 1 by 4 inch tongued and grooved V-jointed ceiling. Walls to be stripped with 1-inch stuff and ceiled. Put in a ceiling at height of trusses with 2 by 6 inch ceiling joists, 20 inches on centers. Ceil the underside with 1 by 4 inch ceiling, and floor the top with 1 by 6 inch tongued and grooved. Put on 1⅛-inch base and vertical wainscoting up to windows. At this height put on chair rail, properly connected with aprons. Put on cornice mold,

both outside and inside, as shown. Windows in partitions are
17 to be double-hung with weights. Put in transom sash where shown, to be furnished by the Government.

100. Stairs.—Build stairways, as shown on plans, with 2 by 14 inch rough stringers, 16 inches on centers, 1¼ by 12 inch treads, and ¾ by 7 inch risers, and ¾-inch scotia mold under nosings. To be housed into wall strings where shown, and to have return nosings where shown, as open stairs. Risers to be grooved and treads tongued into risers. Open stairs to have plain 1¾ by 4 inch hand rails and 1¾ by 1¾ inch square balusters, three to the tread. Newels 4 by 4 inches, plain. All to be properly wedged, glued, and screwed, and left clean and neat on completion. Soffit of first-story stairs to be sheathed.

101. Sliding doors.—Build sliding doors where shown. To be hung with Coburn sliding-door hangers and track, or other equally as good, to be approved by the officer in charge of the work. Doors to be built of three thicknesses of ¾-inch dry sugar pine with 2¼-inch stiles and rails. Panels to be nailed on diagonal.

102. Slating.—Cover roofs with 10 by 20 inch slate, to be nailed with two 4-penny 2-inch copper nails, with ⅜-inch heads to each slate. To be laid 8½ inches to weather, straight and true, with vertical joints on line, starting course to be doubled. Slate to be laid from corners, working upward on diagonal courses, and care to be taken that slates do not ride. No brackets or staging to be laid on slate. Broken or cracked slates must be immediately replaced.

103. Roof of boiler house.—Roof to be covered with No. 20 corrugated galvanized iron, lapped 6 inches, and fastened to purlins with 1 by 3 inch riveted clips and 6-penny nails. Rivets to be copper. To have ventilating ridge and proper flashings.

104. Lead flashing.—Put in 8 by 10 inch 4-pound lead flashings between slates on gable and skylight ends, lapped 4 inches, and turned up against gable 4 inches, and skylight sufficient to form standing seam.

105. Gutter flashing.—Put in 5-pound lead flashing for gutters, to reach up under starter course and to be nailed at height of first row of slate nails. Flashing to be turned down and single lock seamed to galvanized-iron gutter above height of outside gutter.

106. Skylight flashing.—Put on 5-pound apron flashing on bottom and top of skylights, properly locked to translucent fabric and turned up under ventilating ridge. Flash all mullions as shown on drawings. Put on apron flashing on all gable ends. Tuck edge to be doubled ½ inch, tucked into joint between brick and granite at least 1½ inches, and wedged and neatly tuck pointed with cement mortar one to one. Apron to turn down over flashing at least 3 inches.

107. Gutters and down spouts.—Gutters and down spouts to be of No. 20 galvanized iron, formed to detail, with riveted joints and to

be lock jointed with lead flashing. Gutter to be graded 1 inch to each panel, and to have galvanized-iron stays every 4 feet. Put in down spouts every other panel on sides of building, properly connected with gutters, held in place by galvanized-iron hinged and screwed conductor stays every 6 feet, and to be turned out with elbows at height of water table.

108. Ridges.—Put on ridges as shown of No. 20 galvanized iron, to be arranged with openings for ventilation as shown, and properly fastened over lead flashing of skylights.

18 109. Ventilators.—Put on No. 20 galvanized-iron ventilators of sizes shown on plans, securely fastened to combing. Ventilators and ridge to be of the Globe pattern, or other equally as good, approved by the officer in charge of the work.

110. Galvanized-iron face panels.—Put on galvanized-iron face panels, as shown, on all beams over doors. To be put on with screws before brickwork is built over.

111. Translucent fabric.—Put on heavy-weight translucent fabric on all skylights, lock jointed and flashed as shown on drawings. Translucent fabric to be put on and skylights to be in place before slate is laid.

PAINTING OF WOODWORK AND GALVANIZED IRON.

112. Back painting.—Back paint all finished lumber of door and window frames and trim and ceiling where turned against brickwork, with one coat of pure linseed oil and white lead.

113. Outside painting.—Paint outside of all window and door frames, doors, sash, outside and inside of sliding doors and skylight sashes, with three coats of pure linseed oil and white lead. Paint outside and inside of galvanized-iron ridges, ventilators, and conductors, and out, under, and back side of gutters, and both sides of corrugated roof, three coats of red lead and oil.

114. Inside painting.—Paint all interior trim and doors, except sliding doors, throughout the buildings, stairs, treads, risers, rail balusters, both sides of partitions, soffits of stairs, and finished ceilings of office part, with three coats of white spirit alcohol shellac.

115. Oiling of brickwork.—The entire outside of brickwork is to be brushed and washed down clean, and after proper drying is to be painted with two coats of boiled linseed oil, both coats to be heavy. First coat must be put on the entire building and inspected by the officer in charge of the work before the second coat will be allowed to be put on. The granite is to be protected from spotting.

116. Inspection.—The material is to come to the building in unbroken packages, and is to be approved by the officer in charge of the work before using.

NAVY DEPARTMENT,
Bureau of Yards and Docks, October, 1898.

19 *Claimants' Exhibit Y.—Supplemental contract.*

Bureau copy agreement No. 747a.

This supplemental contract, made and concluded this 31st day of March, anno Domini eighteen hundred and ninety-one, by and between The California Bridge and Construction Company, of the city of Oakland, State of California, by Alfred W. Burrell, its president, parties of the first part, and Rear-Admiral Mordecai T. Endicott, U. S. Navy, Chief of the Bureau of Yards and Docks, representing the Secretary of the Navy, acting for and in his behalf, party of the second part, witnesseth:

That whereas it has been deemed advantageous to paint the ironwork for the sawmill, boiler house, and steel chimney. Now this contract witnesseth:

That for and in consideration of the payments and provisions, as hereinafter specified, parties of the first part for themselves and their personal and legal representatives do hereby covenant and agree with the party of the second part to paint all of the ironwork for the sawmill, boiler house, and steel chimney, as follows:

One coat of paint at the shop—all points which come in contact to be painted before being put together—and one coat of paint after erection. Paint to be of the best quality red lead and linseed oil; workmanship to be done to the satisfaction of the civil engineer in charge of the work, for the sum of eight hundred and ten dollars ($810.00), payment to be made and work to be done in the same manner as provided for in specifications forming a part of the contract between The California Bridge and Construction Company and the Navy Department, dated December 21st, 1898.

It is expressly understood that all the conditions and provisions of the contract between The California Bridge and Construction Company and the Navy Department, dated December 21st, 1908, form a part of this supplemental contract.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above mentioned.

CAL. BRIDGE & CONS. CO.,
ALFRED W. BURRELL, *Prest.*
MORDECAI T. ENDICOTT,
Rear-Admiral, U. S. Navy,
Chief of Bureau of Yards and Docks.

Signed in the presence of—
H. D. RICHARDSON, as for Alfred W. Burrell.
WM. M. SMITH, as to M. T. E.

20 II. *Defendant's counterclaim. Filed January 13, 1911.*

Comes now the defendant, by the Attorney General, and alleges that the claimant in this case was at the commencement of this suit,

and still is, justly indebted unto the United States in the amounts set forth in the following items:

(1) The difference between the amount of the contract of the claimant company on the date it was annulled, $56,749, and the amount paid said company as advances, $15,434.32, plus the amount of the contract of Concanon for completing the work, $54,472; this difference amounts to		$13,157.32
(2) Liquidated damages provided for by the contract for delay in the completion of the work. The claimant company's contract time expired June 21, 1899; this time was extended for a period of six months, from February 20, 1900, or until August 20, 1900 (p. 139). The contract was annulled January 2, 1901; the work was finally completed by Concanon December 6, 1901. The three periods are as follows:		
June 21, 1899, to Aug. 19, 1900, inclusive, 425 days, at $25 per day	$10,625.00	
Aug. 20, 1900, to Jan. 2, 1901, inclusive, 135 days, at $25 per day	3,375.00	
Jan. 3, 1901, to Dec. 6, 1901, inclusive, 338 days, at $25 per day	8,450.00	
Total amount of liquidated damages		22,450.00
Total claim of United States against claimant company		35,607.32

Wherefore the defendant files this counterclaim and prays judgment against the claimant in the sum of $35,607.32.

JOHN Q. THOMPSON,
Assistant Attorney General.

MALCOLM A. COLES,
Attorney.

III. *Replication to counterclaim. Filed February 14, 1911.*

1. Now comes the claimant and replying to the counterclaim of defendants denies that it is indebted to the United States in the sum of thirty-five thousand six hundred seven dollars and thirty-two cents ($35,607.32), or in any sum whatever, for or on account of the matters and things alleged in said counterclaim, or otherwise, and avers that the sums alleged in the petition to be due from the defendants to the claimant are in fact due, after allowance of all proper credits and set-offs, and that the defendants are not entitled to any sum whatever by way of counterclaim or otherwise.

2. And the claimant by way of further replication to the said counterclaim says that the defendants ought not to be admitted in their said counterclaim to aver that claimant is indebted to defendants as therein alleged; because defendants herein, heretofore, to wit, on the 28th day of February, A. D. 1903, brought their action of assumpsit in the United States Circuit Court for the Eastern District of Pennsylvania against this claimant, and also against the American Surety Company of New York, Albert Brown and Thomas Prather as defendants, said action being number 80 of October session 1902, in said court, which action was upon the same cause of action as the counterclaim now pleaded by defendants herein; and the said Surety

Company, Brown and Prather were sued in said action solely because they were sureties on the bond to the defendants for the faithful performance of the contract now in suit; and subsequently, to wit, on the 15th day of November, 1906, the said action came on to
21 be tried, and a verdict was found for defendants therein, and subsequently, to wit, on the 20th day of November, 1906, the United States, plaintiffs therein, moved for a new trial, which motion was subsequently, to wit, on the 7th day of December, 1906, overruled by the said court; all of which will more fully appear by a certified copy of the pleadings, docket entries, and record of the said action now on file in this court.

3. And the claimant by way of further replication to the said counterclaim, says that the defendants ought not to have and recover the sum of thirty-five thousand six hundred seven dollars and thirty-two cents ($35,607.32), or any other sum, of the claimant, because claimant was at all times ready and willing to carry out the contract between the parties hereto, but was prevented from so doing by defendants.

4. And the claimant by way of further replication to item 1 of defendants' counterclaim, says that defendants ought not to have and recover the sum of thirteen thousand one hundred and fifty-seven dollars and thirty-two cents ($13,157.32), or any other sum, because the contract with Concanon therein referred to was for different work than that contemplated and required by the contract between the parties hereto.

5. And the claimant by way of further replication to item 1 of defendants' counterclaim, says that defendants ought not to have and recover the sum of thirteen thousand one hundred fifty-seven dollars and thirty-two cents ($13,157.32), or any other sum, because after the making of the contract between defendants and Concanon therein referred to, to wit, on May 31, 1901, the said contract was changed by a supplemental contract between the said Concanon and defendants, and the work required by and performed in accordance with the said supplemental contract was different from that contemplated and required by the contract between the parties to this action.

6. And the claimant by way of further replication to item 2 of defendants' counterclaim, says that the defendants ought not to have and recover the sum of twenty-two thousand four hundred and fifty dollars ($22,450), or any other sum, because claimant was delayed by defendants in the carrying out of the work under the contract in suit.

7. And the claimant by way of further replication to the said counterclaim, says that the defendants ought not to have and recover the sum of thirty-five thousand six hundred seven dollars and thirty-two cents ($35,607.32), or any other sum, of the claimant, because the contract between the parties to this action contemplated the erection of the structures therein required to be built at a certain site at the Mare Island Navy Yard, which site was after the advertisement of

this contract but before the claimant had submitted a bid therefor, pointed out to officers of claimant as the site of the structures proposed to be erected by the advertisement aforesaid, both by duly authorized officers of the United States in person and by being marked with stakes; which site was firm ground suitable for bearing the structures required by the contract, and in which the driving of piles according to the plans and specifications attached to this contract would have been possible at a reasonable cost; and subsequent to the execution of the contract in suit the United States refused to allow claimant to erect the structures required to be erected
22 by this contract on the site hereinbefore referred to, but demanded that claimant erect the said structures at a certain other site at the Mare Island Navy Yard, which site was marsh recently covered with soft material pumped from the bottom of the channel near by, upon which it would have been unreasonably expensive to drive piles and put in foundations at all, and impossible to drive piles in the manner required by the plans and specifications forming a part of the contract in suit; whereupon claimant refused to erect the said structures upon the site last referred to, as it rightfully might, which action of claimant is the supposed default on account of which defendants assumed to annul the contract in suit, and on account of which defendants claim damages of claimant as set forth in their counterclaim.

8. And the claimant by way of further replication to the said counterclaim, says that the defendants ought not to have and recover the sum of thirty-five thousand six hundred seven dollars and thirty-two cents ($35,607.32), or any other sum, of the claimant, because the petition herein was filed and served on the Attorney General on the 17th day of December, 1906, and the counterclaim of defendants was filed on the 13th day of January, 1911, over four years thereafter, whereas it is required by rule 42 of this court that a counterclaim must be filed within sixty days of the service of the petition upon the Attorney General.

KING & KING,
Attorneys for Claimant.

ARCHIBALD KING,
Of Counsel.

STATE OF CALIFORNIA,
County of Alameda, ss:

A. Ray Burrell, being duly sworn deposes and says: I am secretary of the California Bridge & Construction Company, claimant in this case. I have read the above replication and the matters therein stated are true to the best of my knowledge and belief.

A. RAY BURRELL.

Subscribed and sworn to before me this 9th day of February, 1911.

WILLARD WHITE,
[SEAL] *Notary Public.*

23 IV. *Defendant's Rejoinder to Claimant's "Replication to Counterclaim." Filed February 18, 1911.*

[The items in this rejoinder will follow the numbers of the items in claimant's replication.]

1. Now comes the defendant, by the Attorney General, and replying to item 1 of claimant's replication denies the allegations therein contained, and avers that its counterclaim is correct as to items and amounts and is in accordance with the terms and provisions of the contract entered into between the claimant and defendant, which is the subject matter of this suit.

2. And the defendant by way of further rejoinder to the said replication denies that the allegations in item 2 thereof are correct, and avers that the present suit of the claimant company against the defendant is not the same either as to the parties thereto or as to the subject matter thereof as was the suit in the United States Circuit Court for the Eastern District of Pennsylvania, at Philadelphia, Pa. That the California Bridge and Construction Company, the claimant in the present suit, was not a party to the suit in Philadelphia, because it was not served with process and could not have been served with process from that district, and it did not voluntarily appear as a party in said suit. Said suit was an action by the United States against the American Surety Company and the other bondsmen of the California Bridge and Construction Company, and was a suit upon a bond, for liquidated damages. The present suit by the claimant company against defendant herein is for unliquidated damages arising from the alleged breach of the contract, all of which will more fully appear by the pleadings and the charge of the court to the jury in the suit in Philadelphia referred to. In this connection defendant further avers that an effort was made by the claimant herein to introduce in evidence the record, including the depositions of certain witnesses on behalf of the Surety Company in the case in Philadelphia referred to. Whereupon defendant filed its motion to reject from consideration, suppress and strike from the files of this cause said depositions upon the ground that the parties to the suit in Philadelphia were not the same as the parties to the suit at bar in this court, that the subject matter of the two suits was not the same, and that the same opportunity for cross-examination of the witnesses did not exist in the two cases. Upon this question of
24 the admissibility of the depositions aforesaid both written and oral arguments were made by counsel representing the parties hereto. The determination of said question was postponed by the court until the final hearing of this cause upon its merits, and said depositions are not admitted to and form no part of the record in the case at bar.

3. The defendant denies the correctness of the allegations appearing in item 3 of claimant's replication, and avers that claimant was at no time ready or willing to carry out the contract between the

parties hereto, but some time after the awarding of said contract the claimant began and continued to raise multifarious questions of a frivolous character which were calculated to and did delay the prosecution of the work, and that the defendant was unable to accept the unreasonable conditions imposed by the claimant and was finally forced by the conduct of the claimant to annul the contract and to proceed with the completion of the work by readvertising and reletting the contract, which was done in accordance with the terms and conditions of the contract between the parties hereto.

4. Defendant denies the correctness of the allegations contained in item 4 of claimant's replication, and avers that when the contract was executed with Concanon, who was the successful bidder upon the work here in question when the same had been readvertised and relet, the said contract and the specifications forming part thereof were the same as those of the original contract between the parties hereto.

5. Defendant denies the correctness of the allegations contained in item 5 of claimant's replication, and avers that the amounts stated in item 1 of the counterclaim are correct in all essential particulars, being in conformity to the terms and provisions of the contract between the parties hereto.

6. Defendant denies the correctness of the allegations contained in item 6 of claimant's replication, and avers that the items stated in paragraph 2 of the counterclaim are correct in all essential particulars, being in conformity to the terms and provisions of the contract between the parties hereto.

7. Defendant denies in toto and specifically the allegations contained in item 7 of claimant's replication, and avers that the claimant bid upon the work in question and signed the contract between the parties hereto with full knowledge that the site of the buildings had not been definitely determined, but that its determination was subject to approval by the Bureau of Yards and Docks at Washington,
25 and that the claimant company did not acquire any information from anyone authorized to represent the United States in such matters at the Mare Island Navy Yard, or elsewhere, from which it could have properly or reasonably assumed that the site of the building had been definitely located, but that on the contrary the claimant signed the contract which provided for the erection of the buildings in question at the United States Navy Yard, Mare Island, California, knowing at the time of the execution of the contract that the site of said buildings had not been determined upon. Defendant further avers that after the contract was executed and while the question of the location of the buildings was still undetermined claimant commenced the performance of its duties under the contract and delivered certain equipment and materials at the Mare Island Navy Yard, but later began a multiplicity of contentions which the defendant was unable to adjust in any reasonable or satisfactory manner with the claimant, and the claimant continued to indicate by correspondence and otherwise such a lack of purpose or intention to perform the contract that its annulment by the defendant

became a necessity in order to complete the work and obtain the erection and use of the buildings desired.

8. Defendant denies the correctness of the allegations in item 8 of claimant's replication and avers that rule 42 of this court, referred to, does not operate to deprive the defendant of the right to file its counterclaim, and it avers that said counterclaim was filed within time to be entitled to receive the consideration of this court and its judgment in respect thereto.

Defendant joins issue as to this item and each of the other items of claimant's replication.

JOHN Q. THOMPSON,
Assistant Attorney General.

MALCOLM A. COLES, *Attorney.*

26 V. *Traverse. Filed October 29, 1913.*

CALIFORNIA BRIDGE & CONSTRUCTION COMPANY
vs.
THE UNITED STATES.

In the Court of Claims of the United States. No. 29916.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

VI. *History of proceedings.*

On October 29, 1913, this case came on to be heard. Mr. Archibald King was heard for the claimant and Mr. Charles F. Jones was heard in opposition. On October 30, 1913, Mr. King was heard further for the claimant; Mr. Jones was heard for defendants, and the case was submitted.

On February 9, 1914, the court filed findings of fact and conclusion of law and entered judgment for defendants on their counterclaim in the sum of $8,118.20, with an opinion by Atkinson, J.

On May 8, 1914, the claimant filed a motion for a new trial and amendment of findings, which was ordered to the Law Calendar Sept. 14, 1914.

On November 25, 1914, claimant's motion for a new trial and amendment of findings was argued by Mr. Archibald King for the motion and by Mr. C. F. Jones in opposition, and the motion was submitted.

On January 4, 1915, claimants' motion for a new trial was overruled; claimants' motion to amend findings allowed in part and overruled in part; former findings of fact and conclusion of law vacated and set aside and opinion withdrawn. New findings
27 of fact and conclusion of law this day filed, entering judgment for claimant in the sum of $1,254.65, with an opinion by Atkinson, J.

VII. *Findings of Fact, Conclusions of law and opinion of the court. Filed January 4, 1915.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT:

I.

The Navy Department having determined upon the construction of a new sawmill, boiler house, and steel chimney at the navy yard, Mare Island, California, on September 24, 1898, the commandant at said yard, under authority from the Bureau of Yards and Docks, appointed a board of officers to recommend a location for said structure. Said board reported on October 29, 1898, as follows: "The board has the honor to recommend that the proposed new sawmill be located as shown in the accompanying sketch marked 'B.' This sketch is a portion of the 'yard map.' The location so recommended will, for convenience of reference, be hereinafter called 'first recommendation.'"

Said report was approved by the commandant of the navy yard and was by him forwarded to the Bureau of Yards and Docks at Washington for approval or disapproval. Said recommendation was not approved by the Bureau of Yards and Docks, and the commandant, at the request of said bureau, reconvened said board to reconsider the matter of the location of said sawmill.

On December 27, 1898, the board made a second recommendation (hereinafter for convenience of reference termed "second recommendation"), which site was approved by the Chief of the Bureau of Yards and Docks, January 5, 1899, and the commandant of the navy yard was notified accordingly. The "second recommendation" so selected and approved was the site upon which the sawmill was subsequently built. No site for said structure could be definitely established at said navy yard until the recommendation of its location was approved by the Chief of the Bureau of Yards and Docks, at Washington.

28 II.

Plans for said work were submitted to the chief of the bureau on September 13, 1898, and same were approved by the chief September 19, 1898. Specifications for advertising were submitted September 30, 1898, which were approved by the chief of the bureau October 7, 1898. At some time between October 29, 1898, and the date of claimant's bid (November 19, 1898) a map and blue print had been made and were on file with plans and specifications in the office of the civil engineer at the navy yard for the examination of bidders. Upon this blue print was indicated by appropriate marks the "first recommendation" of the proposed structure, and into the ground at

said "first recommendation" stakes were driven at points where would be the corners of said building if erected at that place.

III.

On October 24, 1898, the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, Navy Department, published the following advertisement:

"Sealed proposals, in duplicate, indorsed 'Proposals for the construction of sawmill, boiler house, and steel chimney at the U. S. navy yard, Mare Island, Cal.,' will be received at the Bureau of Yards and Docks, Navy Department, Washington, D. C., until 1 o'clock p. m., on Saturday, November 26, 1898, and publicly opened immediately thereafter. Specifications and blank forms of proposals will be forwarded upon application to the bureau or the commandant of the U. S. navy yard, Mare Island, Cal. Bidders are expected to fully inform themselves of the character of the work by visiting the navy yard, where plans may be examined and obtained. Appropriation for this work is $75,000.—Mordecai T. Endicott, Chief of Bureau. October 24, 1898."

The commandant at the Mare Island Navy Yard was primarily the authorized official to give information to prospective bidders, and this fact was known to claimant company. Said commandant had delegated his authority to Robert C. Hollyday, the civil engineer in charge of the work, to whom all persons were referred. Mr. Hollyday in turn selected two assistants—Arthur P. Noyes, civil engineer, and Frank H. Green, inspector—who, with himself, were the only persons authorized to give information in regard to the proposed work.

IV.

In response to said advertisement, and before making any bid, Albert W. Burrell, the president of the claimant company, a corporation organized under the laws of the State of California, and representing claimant, visited said navy yard with the view of making a bid for claimant company upon the proposed work. Said Burrell examined the plans and specifications, saw said map and blue print, and was shown by a duly authorized official at the navy yard the "first recommendation" of the proposed work. He was informed at the time by said official that the site of said structure was not definitely fixed; that the location indicated by certain stakes, which were pointed out to him, had been recommended, but that the
29 recommendation had not been approved by the Navy Department; and that the location was liable to be changed to some other place within the limits of the navy yard.

At request of claimant company Civil Engineer Hollyday on November 3, 1898, sent claimant a set of specifications and blue prints numbered B–216 to B–223, and a receipt for same to be signed and returned. Said receipt stated that the plans and specifications

and two sets of blank forms were received for the purpose of making proposal for erecting a sawmill, boiler house, and steel chimney. In his letter transmitting same no mention was made by said civil engineer that the site for the buildings was undetermined or liable to change.

V.

On November 19, 1898, claimant company submitted a bid for the performance of the work advertised for the sum of $55,939, and said bid was accepted by the defendants for the "construction of sawmill, boiler house, and steel chimney at the United States navy yard, Mare Island, California, according to plans and specifications referred to in said advertisement," and claimant was so notified on December 6, 1898. Thereafter on December 21, 1898, a contract was entered into between the claimant corporation as principal and the American Surety Company, of New York, Albert Brown and Thomas Prather as sureties, parties of the first part, and the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, party of the second part. A copy of said contract and the specifications forming a part thereof are annexed to the amended petition herein and marked "Exhibit X," and are hereby made a part of this finding.

VI.

On January 19, 1899, the claimant notified defendants' engineer in charge at Mare Island that "in order to literally comply with paragraph 7 of your specifications," claimant had commenced work thereunder, and stated: "As soon as you are able to notify us that the changed location of the buildings has been definitely fixed we will immediately commence work on the foundations." On the 5th day of January, 1899, the Chief of Bureau of Yards and Docks notified the commandant at Mare Island that the "second recommendation" of a location for said work was approved.

In claimant's letter of January 19, 1899, had been inclosed a "schedule of prices" required by paragraph 21 of the specifications, and its receipt was acknowledged February 3, 1899, by said engineer, who stated to claimant that said schedule of prices had been taken as a basis from which a schedule of prices to be used as a monthly payment for the work done would be made.

On February 25, 1899, the claimant accepted said schedule of prices with some modifications which had been made therein at claimant's request. On February 16, 1899, claimant notified said engineer of the closing of a contract by it for the "structural steel for the sawmill boiler house now under contract for construction by us at Mare Island," and asked to be notified as to shop inspection and shop drawings. And on February 22, 1899, a similar notice
30 was given to and request made by claimant of the Chief of Bureau of Yards and Docks at Washington.

On February 27, 1899, defendants' said engineer sent to claimant a copy of the said schedule of prices (referred to in said acceptance by claimant February 25) and asked if same was satisfactory, and on March 2, 1899, claimant expressed satisfaction with same, which was a "schedule of prices of material in place for sawmill, boiler house, and steel chimney to be erected at this yard for which the California Bridge & Construction Co. has the contract," and purported to set forth the different kinds of material and work in an itemized form and the prices which aggregated the contract price.

On March 1, 1899, claimant was notified by said engineer in charge: "The site for the sawmill has been selected and you are at liberty to start in work as soon as you desire." And on March 2, 1899, claimant stated to defendants' said engineer: "We are pleased to learn * * * that the site for the sawmill, boiler house, etc., has been selected," and that work thereon would be commenced as soon as the necessary material could reach the ground, adding: "In the meantime, will you kindly inform us whether the original site was finally decided upon, and if not, what the new location is?"

VII.

Claimant's president visited the navy yard on March 8, 1899, and on that date, "to prevent possible misunderstanding," quoted two questions asked by the proposed manufacturers of said structural steel, which were answered by said engineer, and on March 13 said engineer acceded to the request that the bars of a defined size could be used in lieu of tee bars described in the specifications.

On March 18, 1899, claimant inquired of said engineer "If we should desire to drive a few test piles the latter part of next week for the purpose of determining the lengths required, would it be feasible for us to use your pile-driver frame for that purpose"; but it being otherwise engaged its use was not secured.

On March 25, 1899, claimant sent to said engineer duplicate blue print of columns for sawmill building and girders, and stated it was "making heroic efforts to secure the piles for our work without delay and hope to succeed. If we should find it impossible, would it be feasible to substitute redwood piles?"

Several communications then passed between the parties relative to different features of the work, and on March 30, 1899, the claimant stated to defendants' said engineer in charge that it had been and still was "unable to procure the fir piles specified for use in the construction of the sawmill, boiler house, and steel chimney at Mare Island for which we are under contract," for the reason that the last raft of piles "being imported to this market by the only parties engaged in that business was mostly lost at sea through unavoidable storms," and that said occurrence would delay the prosecution of said work two or three months, and asked that said matter be considered in accordance with paragraph 9 of the specifications. On March 31, 1899, claimant acknowledged receipt of other shop drawings and

detail drawings of parts of said works and notified defendants' engineer of its desire "to start cutting on the granite work immediately."

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VIII.

A board having been appointed and made its report upon the question of the additional compensation to be paid claimant for painting the ironwork of said buildings, fixing the same at $810, a supplemental contract, March 31, 1899, was made between the parties as follows:

"This supplemental contract, made and concluded this 31st day of March, anno Domini eighteen hundred and ninety-one, by and between the California Bridge and Construction Company, of the city of Oakland, State of California, by Alfred W. Burrell, its president, parties of the first part, and Rear Admiral Mordecai T. Endicott, U. S. Navy, Chief of the Bureau of Yards and Docks, representing the Secretary of the Navy, acting for and in his behalf, party of the second part, witnesseth:

"That whereas it has been deemed advantageous to paint the ironwork for the sawmill, boiler house, and steel chimney. Now this contract witnesseth:

"That for and in consideration of the payments and provisions, as hereinafter specified, parties of the first part for themselves and their personal and legal representatives do hereby covenant and agree with the party of the second part to paint all of the ironwork for the sawmill, boiler house, and steel chimney, as follows:

"One coat of paint at the shop—all points which come in contact to be painted before being put together—and one coat of paint after erection. Paint to be of the best quality of red lead and linseed oil; workmanship to be done to the satisfaction of the civil engineer in charge of the work, for the sum of eight hundred and ten dollars ($810.00), payment to be made and work to be done in the same manner as provided for in specifications forming a part of the contract between the California Bridge and Construction Company and the Navy Department, dated December 21st, 1898.

"It is expressly understood that all the conditions and provisions of the contract between the California Bridge and Construction Company and the Navy Department, dated December 21st, 1898, form a part of this supplemental contract.

"In witness whereof the said parties have hereunto set their hands and seals the day and year first above mentioned.

"CAL. BRIDGE & CONS. CO.,
"ALFRED W. BURRELL, *Prest.*
"MORDECAI T. ENDICOTT,
"*Rear Admiral, U. S. Navy,*
"*Chief of Bureau of Yards and Docks.*

"Signed in the presence of—
"H. D. RICHARDSON, as for Alfred W. Burrell.
"WM. M. SMITH, as to M. T. E."

Thereafter, and upon the dates of April 7, 8, 10, 11, and 13, communications passed between the parties relative to drawings, details, and features of the work and on April 18, 1899, claimant inquired of defendants' engineer "whether in the progress estimates for payment on account of our contract for constructing sawmill, etc., at Mare Island the joist hangers were included, and if so, the amount of payment so included."

32

IX.

On or about the 10th day of April, 1899, the claimant drove a pile at the southeast corner of the "first recommendation" and then moved over to the "second recommendation" and drove four piles there. The first pile driven was 50 feet long, 15 inches at the butt; the penetration was 1.4 inches at last blow; safe load 26 tons.

The four piles driven at the second recommendation were as follows:

"Pile No. 1 was driven at the northeast corner of the building; it was 67 ft. long, 19″ at the butt; the penetration was 0.53 of an inch at last blow; safe load 42 tons.

"Pile No. 2 was driven at the southeast corner of the building; it was 71 ft. long, 16″ at the butt; the penetration was 1.7 inches at last blow; safe load 23 tons. At 60 ft. the penetration was 1.4 inches; safe load 26 tons. The pile was allowed to remain 14 hours and driving then commenced; at the first five blows the pile did not sink at all; the penetration was the next 15 blows was 2¼″.

"Pile No. 3 was driven at the southwest corner of the building; it was 73 ft. long, 16″ at the butt; at last blow the penetration was 1.08″; safe load 30½ tons. At 58 ft. down the penetration of the pile was 0.85 of an inch; safe load 38½ tons.

"Pile No. 4 was driven at the southwest corner of the boiler house; it was 73 ft. long, 15″ at the butt; penetration was 1.27″; safe load 28½ tons at 60′ down. Last blow penetration 1.4″; safe load 26 tons."

A boring was also taken by means of a water jet near the southwest corner where hard compact clay mixed with sand and gravel was found at 125 feet. And on May 3, 1899, claimant's president, who was all along acting for claimant, notified defendants' said engineer in charge at Mare Island of a desire to confer with him "regarding the conditions developed by the change in location," and on the same day forwarded to said engineer tracings and blue prints of details of parts of the work called for by the contract.

X.

On May 10, 1899, claimant addressed a communication to the commandant at said navy yard, as follows:

San Francisco, Cal., (no date).

"Commandant Mare Island Navy Yard,
"*Mare Island, Cal.*

"Dear Sir: Referring to the sawmill, boiler house, and steel chimney for Mare Island Navy Yard, for the construction of which the

undersigned is now under contract, we would respectfully represent as follows:

"Upon signing the contract, dated December 21st, 1898, and proceeding to commence work, we learned that a change in the location of the building from the site originally intended and surveyed to some other point of location was under consideration by the Govt.

"While waiting for a decision by the Govt. as to the point of location, before which time it was obviously impossible for us to determine the length of piles required, a considerable advance took place in the market price of that as well as of other material.

33 "On March 1st, 1899, we were notified that the new location had been determined upon.

"When the location was finally made and we proceeded to purchase the necessary piles of such length as was supposed to be suitable, we found that the market was practically bare of piles by reason of the loss of large quantities of piles which were being imported by raft to supply the market.

"While waiting the arrival of piles we proceeded to make some tests, in order to determine to what extent, if any, the change to the new location would increase the cost of construction as affected by the pile driving. We drove one pile at the original location and drove four piles and sank one pipe well with water jet at the new location, under the inspection of the civil engineer in charge of the work.

"This test work may not be sufficient in extent to show the difference in the cost of foundation as between the two locations, but it seems to demonstrate that the conditions at the new location are very different from what was expected, and in our judgment demonstrates that it is practically impossible to obtain the specified foundation at that point. Instead of reaching a sufficiently firm bottom at approximately 45′ depth, as was generally supposed would be the case at the new location, we found that piles 72′ long were fully driven without finding stable bottom, and the test made with water jet and pipe shows that the desired foundation is not found at a less depth than 123′. It can not be considered reasonably practicable to extend the specified foundation to such a depth, and we feel justified in the conclusion, not only from the test made in this particular location, but from our experience and observation of similar work under similar conditions elsewhere, that to attempt to erect a building of the weight and character of construction provided for in this case upon a pile foundation which does not rest upon the character of bottom specified would require the contractor to assume a greater hazard during its construction than would be reasonable and a hazard not originally intended.

"Aside from the question of pile driving, an inspection of the two locations in question shows that in the original one the ground, which would laterally support the piles and the general construction, is firm and dry, affording good lateral stability to the structure and good

feasibility for excavation and work necessary in placing the concrete footings and walls; while on the other hand the ground at the new location consists of low tule marsh, the surface lying below high tide and overlain with materials dredged from the channel in front of the island, lacking the lateral stability necessary to support the rigid construction above, and containing water and mud to such an extent as will largely increase the cost of excavation, pumping, and work necessary to properly place the concrete.

"The distance of haul of all material going into the construction of the building will be increased by the change in location.

"For the above reasons we respectfully ask, in pursuance with paragraphs 13 and 14 of our specifications, and also in accordance with the 2nd paragraph on the 2nd page of our contract, that steps be taken immediately to determine:

"1. What character of construction will now be required in view of the conditions existing at the new location?

34 "2. The increased or decreased compensation to which the contractor may be entitled by reason of the change in location and the consequent necessary changes in construction.

"3. The extent to which the contractor will be required to assume responsibility for the stability of the work during construction at the new location.

"We also ask that the time for completion of the work as provided for in our contract be extended four months, and in addition thereto such time as may be necessary to now determine the matters herein set forth.

"It may be pertinent for us to add that the preparation of material of various kinds for this work has gone forward with due promptness, and that we should have completed the building within the time originally provided for except for the circumstances above stated.

"This communication is intended to secure the most prompt and equitable determination of the questions developed through the change in location of the building; questions which could not have been foreseen by any one, and during your consideration of the subject we beg that you will consider us not as a contractor seeking to obtain an undue advantage in the premises but as a contractor endeavoring to carry out its contract in good faith, in a manner to secure justice to itself and to best serve the interest of its employer. We have endeavored to state the facts as we understand them; and if any of our statements are questioned, we beg the privilege of opportunity to be heard in explanation before any decision is made.

"Pending consideration of this matter we are ready to do anything possible upon request which will further the objects of our contract.

"CALIFORNIA BRIDGE AND CONSTN. CO.,
"By ALFRED W. BURRELL, *President*."

The foregoing is the first notice given by claimant relative to its claim of a change in the location or site from that contracted for.

XI.

On or about May 10, 1899, claimant, by letter to the commandant of the navy yard protested against being required to build at the "second recommendation," claiming that the soil was materially different from that at the "first recommendation" and not so adapted to serve as foundation for the buildings; that it would be impossible to obtain at the "second recommendation" the penetration of piles required by the specifications; that the distance which materials would have to be hauled was increased, and requesting that a board be appointed in accordance with the contract and paragraphs 13 and 14 of the specifications to determine (1) the character of construction that will be required at the "second recommendation" in view of the conditions existing, (2) the increased or decreased compensation to which the contractor may be entitled by reason of the change in location and necessary changes in construction, (3) the extent to which the contractor will be required to assume responsibility for the stability of the work during construction. They also requested that the contract time be extended four months, in addition to the time required to determine the matters above set forth. In a subsequent letter, dated May 22, 1899, claimant again protested against
35 being required to build on the "second recommendation" and explained more fully its contentions.

The Bureau of Yards and Docks, on June 13, 1899, decided that claimant's contention as to change of site after the letting of the contract was not sustained; that the "second recommendation" was the only authorized site; that it found no cause for extra work not contemplated by the specifications or for any change involving increased compensation, and directed that the requirements of the specifications as regards diameter of piles and final penetration be waived so that sufficient length and bearing power might be secured for each pile as determined by the officer in charge. On June 24, 1899, the civil engineer notified claimant that the specification for diameter of piles was waived and gave the contractor the penetration of piles for each particular case as determined by him.

During the months of June, July, and August, 1899, no work was done and no piles were delivered by claimant, but considerable material was delivered at the works.

Claimant company wrote to the commandant of the navy yard on September 14, 1899, again stating its position in regard to change of site and other matters of difference between the contractor and the Government officials, and gave notice that it was ready, able, and willing to proceed at once with the construction and completion of the sawmill as soon as the differences were adjusted.

No progress was made in the work by the contractors during the fall, and on December 12, 1899, a board of three naval officers was appointed by direction of the Bureau of Yards and Docks to consider and report with recommendations in respect of all questions in

dispute. Said board, after full investigation, in which many witnesses were examined, including the president of claimant company and Civil Engineer Hollyday, submitted its report December 30, 1899, in which the failure to complete the buildings within the time specified in the contract was stated by said board to be, first, delay caused by the Government's uncertainty regarding site, which delay extended from December 21, 1898, to March 1, 1899, and further delay was caused by awaiting a decision from the bureau regarding dimensions and penetration of piles until June 24, 1899, when the contractor was notified that certain requirements would be waived; second, from June 24, 1899, until the present time the delay has been due to the action of the contractors in not proceeding with their work according to the contract. Said board recommended that the contractors be called upon to begin work in accordance with modified plans and specifications within 30 days from the date on which the contractor is notified of the bureau's action, and that six months' extension of time from the date of such notification be allowed for the completion of the buildings. This report was duly approved by the Bureau of Yards and Docks February 7, and by the Navy Department February 9, 1900.

Claimant was accordingly notified that an extension of six months within which to complete the work would be granted from the date of the receipt of notification (February 20, 1900), and that "such continuance of the work and extension of time are conditioned upon a board being appointed at a proper time for the purpose of taking into consideration the question of whether or not the contractors shall be entitled to any increased or decreased compensation
36 under the contract on account of the location of the work being different from that which the contractors alleged they understood to be the site selected, and upon which they based their bid, the report of said board to be submitted to the department for its consideration and action and final determination as to the rights of the contractors under the contract." Claimants were also informed that said proposed board would probably not report until after the foundation had been completed.

The above communication was received by claimants February 21, 1900, and on March 16, 1900, they declined to agree to said proposition and contended that before proceeding with the work the rights and liabilities of the parties should be agreed upon, and submitted other propositions, to wit, (1) that all claims for penalties or forfeitures should be abandoned; (2) that a board of three naval officers be appointed to determine in advance of the performance of the work, by means of tests, the expense thereof to be borne equally by the claimants and the Government, the increased or decreased cost of construction at the second site as compared with the first; and (3) that it should be agreed that there was no open question whether said board should or should not adjudge the increased or decreased

compensation. Claimants also offered in the alternative to submit a money bid for the work at the second site.

These propositions were referred to the Navy Department, which on April 24, 1900, decided that its decision of February 9, 1900, hereinbefore mentioned, and the action of the Bureau of Yards and Docks in accordance therewith, should be modified so that the board of naval officers to be appointed would be directed to determine, subject to the department's approval, the actual and just amount of the increased or decreased compensation the contractor would be entitled to receive on account of building the structures in question, under the proposed six months' extension upon the second site instead of on the first site; and that said board should be appointed as soon as practicable and instructed to make an examination of the character of the foundations of the two sites, the expense to be borne equally by the claimants and the Government.

The Chief of the Bureau of Yards and Docks on April 26, 1900, transmitted to the contractor a draft of supplemental agreement, drawn in accordance with the foregoing decision, providing that the time for the completion of the work be extended six months from the date of notice to proceed with the work, said notice to be given after the determination of the increased or decreased compensation, and requested its signature and seal to same.

A board of three naval officers, of which Captain William H. Whiting was senior member, was appointed May 3, 1900, to ascertain the increased or decreased compensation in accordance with said decision of the Navy Department.

On May 14, 1900, claimant notified the Bureau of Yards and Docks that it declined to execute the draft of supplemental agreement hereinbefore mentioned, reiterated the position taken in its letter of March 16, 1900, and submitted another proposition setting forth in detail other elements of expense which it desired should be considered and determined by said board.

After due consideration of claimant's letter, the Navy Department transmitted to the Bureau of Yards and Docks the same draft
37 of agreement, and said bureau again, by letter of June 8, 1900, called upon claimant to execute said agreement, which claimant declined to do and so advised the Chief of the Bureau of Yards and Docks by letter dated June 25, 1900. Said letter was referred by the bureau to the Navy Department July 5, 1900, and that department returned it again September 18, 1900, through the Bureau of Yards and Docks, stating that the form of supplemental agreement previously submitted embodied a complete plan for a just and equitable settlement of all matters in controversy between the department and the contractor, and requested that claimant execute said supplement agreement. Claimant again refused by letter of October 23, 1900, to the Chief of the Bureau of Yards and Docks to execute said agreement. Said letter was referred to the Navy Department

November 17, 1900, and was returned to the chief of the bureau November 20, 1900, and thereupon that officer forwarded it to the commandant of the navy yard with directions to convene a board under the provisions of paragraph 8 of the specifications to consider and recommend whether the contract should be annulled and the work completed in such a manner as is deemed best, at the expense of the contractor and his sureties.

A board composed of Capt. W. H. Whiting, Lieut. Augustus F. Fechteler, and Civil Engineer Richard C. Hollyday was duly appointed, and after hearing claimant and receiving its written argument, said board recommended on December 20, 1900, that the contract between the parties be annulled and the work completed in such manner as might be deemed best at the expense of claimant and its sureties. Said report was approved by the chief of the bureau, and, acting under instructions of the Secretary of the Navy, he wrote claimant and its sureties on January 2, 1901, declaring said contract null and void.

Said letter of January 2, 1901, addressed to claimant and his sureties was as follows:

"GENTLEMEN: It appearing that you have failed on your part to perform the contract between yourselves, as parties of the first part, and the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy, party of the second part, dated December 21, 1898, for the construction and completion in all respects of a sawmill, boiler house, and steel chimney at the United States Navy Yard, Mare Island, California, within six calendar months from the date of said contract, the party of the second part exercising the option reserved to them declare said contract null and void, without prejudice to their right to recover for defaults therein or violations thereof.

"2. Please take notice that an advertisement will be prepared and issued inviting proposals to complete the work under the aforesaid contract, and that said work will be completed at your expense."

And on January 8, 1901, the claimants, replying to said letter of January 2, 1901, acknowledged receipt of the latter and stated to the chief of the bureau the following:

"First. That the Government from the time it changed the staked-out site for another and from the time it served notice on the undersigned not to proceed with the work at the staked-out site, has been in a state of protracted default on its part and now so remains in default notwithstanding the many laborious and bona fide efforts on our part as one party to the contract to avoid the present out-
38 come, brought about by the recent action of the other party to the contract, of which your letter of January 2, 1901, gives notice.

"Second. That the Government in so advertising for proposals and doing any of the work referred to in your notification will be acting on its own account and not on account of the undersigned or its sureties."

XII.

On January 17, 1901, the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, published the following advertisement:

"Sealed proposals, endorsed 'Proposals for completing sawmill, boiler house, and steel chimney,' will be received at the Bureau of Yards and Docks, Navy Department, Washington, until one o'clock March 16, 1901, and then and there publicly opened, for completing the construction of a sawmill, boiler house, and steel chimney at the navy yard, Mare Island, Cal. For further information, plans, specifications, and forms of proposals address 'Commandant, Navy Yard, Mare Island, Cal.' Mordecai T. Endicott, Chief of Bureau. Jan. 17, 1901."

The lowest bidder in response to above advertisement was William N. Concannon, whose bid was $54,472. On April 8, 1901, a contract was entered into between the said Concannon and the United States, which contract was identical with that entered into between claimant and defendant December 21, 1898, except as to price, date, and name of parties, and the specifications were the same as those between claimant and defendant, with the following additional specification:

"*Specification No. 1127, for the completion of a sawmill, boiler house, and steel chimney at the U. S. Navy Yard, Mare Island, Cal., under the appropriation 'Earthquake.'*

"[Act approved May 4, 1898.]

"GENERAL CONDITIONS.

"1. Intention.—It is the declared and acknowledged condition and meaning to provide and secure the completion of the construction of a sawmill, boiler house, and steel chimney at the navy yard, Mare Island, Cal., according to the plans and specification which were attached to and formed a part of a contract between the California Bridge and Construction Company, of the City of Oakland, State of California, by Alfred W. Burrell, its president, as principal, and the American Surety Company of New York, a corporation, and Albert Brown, of Oakland, Alameda County, Cal., and Thos. Prather, of Oakland, Alameda County, Cal., as sureties, parties of the first part, and the United States, by Mordecai T. Endicott (Chief of the Bureau of Yards and Docks), acting under the direction of the Secretary of the Navy, party of the second part, dated December 21, 1898, and changes in the same as hereinafter stated, made in accordance with the terms of the contract, said contract having been declared forfeited. Copies of the plans and specification re-
39 ferred to and further information, if desired, can be obtained upon application to the commandant of the navy yard, Mare Island, Cal.

"2. The changes made in the specification under date of March 31, 1899, are as follows:

"All ironwork to be painted as follows: One coat of paint at the shop—all points which come in contact to be painted before being put together—and one coat of paint after erection. Paint to be of the best quality red lead and linseed oil; workmanship to be done to the satisfaction of the civil engineer in charge of the work.

"3. Following is a reprint of the specification referred to, the terms of which will govern in making proposals, executing contract, carrying on and completion of the work, including, among other things, time for commencement and completion of the work, extension of time, penalty for delay, tests, inspection, etc., and which will be made the basis of the contract for the completion of the work.

"4. Under the terms of the aforesaid contract there was delivered at the navy yard, Mare Island, Cal., the following quantities of material, which will be turned over without charge to the contractor for the completion of the work, viz: 47 cubic yards broken stone; 392,483 pounds structural steel; 126,000 feet b. m. lumber; 52,000 feet b. m. flooring; 933 cubic feet granite.

"This material is now in good condition and may be seen at the navy yard, Mare Island, Cal.

"NAVY DEPARTMENT,

"BUREAU OF YARDS AND DOCKS, *January, 1901.*"

During the period of construction four supplemental contracts, duly assented to by the contractor's sureties, were entered into between said Concannon and the United States, which are as follows:

(1) This agreement, made and concluded this 31st day of May, 1901, by and between William N. Concanon, a citizen of San Francisco, Cal., party of the first part, and the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part,

Witnesseth: That whereas it has been deemed necessary and advisable to make certain changes in the provisions of the contract between the parties hereto, dated April 8, 1901, for the construction of a sawmill, boiler house, and steel chimney at the United States Navy Yard, Mare Island, California:

Now, therefore, in consideration of the premises and for and in consideration of the mutual covenants and agreements hereinafter made, it is mutually covenanted and agreed as follows:

1st. That paragraph twenty-four (24) of the specification attached to and forming a part of the aforesaid contract shall be modified to read as follows:

"The round piles are to be of Douglas fir, straight, free from large, loose, or rotten knots, falling or wind shakes, or other defects affecting their strength; they are to be not less than six inches at the small end and twelve inches at the large end; they are to have sufficient length so that when driven the penetration shall not exceed an

average per blow for the last five blows of a hammer weighing three thousand pounds falling 20 feet, or equivalent thereof, as shown on the following table and to have a length not less than that shown on the following table:

No. of pier.	Average pene. for last 5 blows.	Min. length for cut-off.	No. of pier.	Average pene. for last 5 blows.	Min. length for cut-off.
1	2″	45	33	2″	45
2	1	60	34	2	45
3	1	60	35	2	45
4	1	60	36	2	45
5	1	60	37	2	45
6	1	60	38	2	45
7	1	60	39	1½	45
8	1	60	40	2	45
9	1	60	41	1	60
10	1	60	42	1	60
11	1	60	43	1	60
12	1	60	44	1	60
13	1	60	45	1	60
14	1½	45	46	1	60
15	2	45	47	1	60
16	2	45	48	1	60
17	2	45	49	1	60
18	2	45	50	1	60
19	2	45	51	1	60
20	2	45	52	1	60
21	2	45	53	2	45
22	2	45	54	2	45
23	2	45	55	2	45
24	2	45	56	2	45
25	2	45	57	2	45
26	1½	45	58	2	45
27	1½	45	59	2	45
28	2	45	60	2	45
29	2	45	61	2	45
30	2	45	62	2	45
31	2	45	63	2	45
32	2	45			

2nd. That the compensation stated in the aforesaid contract shall be reduced by the sum of two thousand and seven hundred and eighty-one dollars and thirty-one cents ($2,781.31), and that the residue shall constitute full payment for all work done and material furnished under the aforesaid contract and this agreement.

Provided, however, that this agreement shall be held and regarded as and be supplemental to the aforesaid contract, dated April 8th, 1901, and shall be subject to all the requirements and conditions thereof, except as herein provided, and shall in no manner affect the validity and effect or action thereof or of the bond attached thereto; and

Provided further, that this agreement shall be accepted, signed, and sealed by the surety on the bond attached to the aforesaid contract; and said surety is hereby made a party to this agreement for

the purpose of extending the obligation of said bond to cover the changes herein provided for.

In witness whereof the respective parties hereto have set their hands and seals the day and year first above written.

W. N. CONCANON.
THE AETNA INDEMNITY COMPANY,
OF HARTFORD, CONN.,
By H. B. HAUGHEM,
Resident Vice-President.
J. D. MAXWELL,
Resident Asst. Secretary.
THE UNITED STATES,
By MORDECAI T. ENDICOTT,
Chief of Bureau of Yards and Docks,
Acting under the direction of the Secretary of the Navy.

41 (2) "This agreement, made and concluded this 23 day of July, 1901, by and between William N. Concanon, a citizen of San Francisco, California, party of the first part, and the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part.

"Witnesseth, that whereas it has been deemed necessary and advisable to make certain changes in the provisions of the contract between the parties hereto, dated April 8, 1901, for the construction of a sawmill, boiler house, and steel chimney at the United States navy yard, Mare Island, California:

"Whereas, agreement No. 909A, dated the 31st day of May, 1901, is based on estimate that there are one hundred and seventy-four (174) piles, fifty-three (53) feet long, valued at twelve dollars and seventy-six cents ($12.76) each in place; and

"Whereas, as a matter of fact, according to plans and specifications, there are one hundred and eighty-four (184) piles, fifty-three (53) feet long, valued at twelve dollars and seventy-six cents ($12.76) each in place.

"Now, therefore, in consideration of the premises, and for and in consideration of the mutual covenants and agreements hereinafter made, it is mutually covenanted and agreed as follows:

"That the compensation stated in the aforesaid contract shall be increased by the sum of one hundred and twenty-seven dollars and sixty cents ($127.60) and that this amount is an increased compensation over the contract dated April 8, 1901, and agreement No. 909A, dated the 31st day of May, 1901, and that this amount shall constitute full payment for all work done and material furnished under aforesaid contract, agreement No. 909A, and this agreement.

"Provided, however, that this agreement shall be held and regarded as and be supplemental to the aforesaid contract, dated April 8th, 1901, and shall be subject to all the requirements and conditions thereof, except as herein provided, and shall in no manner affect

the validity and effect or action thereof or of the bond attached thereto; and

"Provided further, that this agreement shall be accepted, signed, and sealed by the surety on the bond attached to the aforesaid contract; and said surety is hereby made a party to this agreement for the purpose of extending the obligation of said bond to cover the change herein provided for.

"In witness whereof, the respective parties hereto have set their hands and seals the day and year first above written.

"W. N. CONCANON,
"THE AETNA INDEMNITY COMPANY,
"*Attorney-in-fact.*
"THE UNITED STATES,
"By MORDECAI T. ENDICOTT,
"*Chief of Bureau of Yards and Docks,*
Acting under the direction of the Secretary of the Navy."

42 (3) "This agreement, made and concluded this 17 day of August, 1901, by and between William N. Concanon, a citizen of San Francisco, California, party of the first part, and the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part, witnesseth, that,

"Whereas, it has been deemed necessary and desirable to make certain changes in the provisions of the contract between the parties hereto, dated April 8, 1901, for the construction of a sawmill, boilerhouse, and steel chimney at the United States navy yard, Mare Island, California.

"Now, therefore: In consideration of the premises, and for and in consideration of the mutual convenants and agreements hereinafter made, it is mutually convenanted and agreed as follows:

"1st. That the party of the first part shall be permitted to and shall place pile and concrete foundations under three steps, as shown on blue print B–216 attached hereto and forming a part thereof;

"2nd. That the party of the first part shall be permitted to and shall place pile and grillage foundation under flue leading from boilers to steel chimney, as shown on said blue print;

"3rd. That the party of the first part shall be permitted to and shall change the foundations in east and west brow from concrete tiers to redwood lumber, as shown on said blue print and blue print B–221 also attached hereto and forming a part thereof;

"4th. That there shall be paid to the party of the first part, in addition to the compensation stated in the aforesaid contract, the sum of two hundred and ninety-two dollars and forty-five cents ($292.45), which shall constitute full payment for all material and work done under this agreement.

"Provided, however, that this agreement shall be held and regarded as and be supplemental to the aforesaid contract, dated April

8, 1901, and shall be subject to all the requirements and conditions thereof, except as herein provided, and shall in no manner affect the validity and effect or action thereof or of the bond attached thereto; and

"Provided, further, that this agreement shall be accepted, signed, and sealed by the surety on the bond attached to the aforesaid contract; and said surety is hereby made a party to this agreement for the purpose of extending the obligation of the bond to cover the changes herein provided for.

"In witness whereof, the respective parties hereto have set their hands and seal the day and year first above written.

"Signed and sealed in the presence of—

"W. N. CONCANON,
"THE AETNA INDEMNITY CO.,
"*Hartford, Conn.*
"By J. D. MAXWELL,
"*Gen. Agent and Attorney.*

"THE UNITED STATES,
"By MORDECAI T. ENDICOTT,
"By J. D. MAXWELL,
"*Chief of Bureau of Yards and Docks, Acting under the direction of the Secretary of the Navy.*"

43 (4) "This supplemental agreement made and concluded at Washington, D. C., this 31 day of October, A. D. 1901, by and between William N. Concannon, a citizen of San Francisco, California, acting for himself, his heirs, executors, and administrators, party of the first part, and the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part,

"Witnesseth, that whereas it is deemed necessary and desirable to make certain changes in the provisions of the contract between the parties hereto, dated April 8th, 1901, for the construction of a sawmill, boiler house, and steel chimney at the United States Navy Yard, Mare Island, California.

"Now, therefore, in consideration of the premises, and for and in consideration of the covenants and promises hereinafter stated, one for the other, it is mutually covenanted, agreed, and promised as follows; that is to say:

"First. That the party of the first part shall be permitted to and shall provide an opening, to be closed with steel doors, in the wall separating the shavings room from boiler room in the sawmill being constructed under the aforesaid contract; change the position of the stairways leading to and from the boiler room; provide a foundation for the bulkhead wall to separate the engine from the boilers; omit the south wall of the tool room, all as shown on blue print No. 3818 attached hereto and forming a part thereof;

"Second. That no change shall be made in the amount of compensation to be paid under the aforesaid contract by reason of the changes herein provided for.

"And it is further mutually understood, promised, covenanted, and agreed that this agreement shall be held and regarded as and be supplementary to and amendatory of the aforesaid contract, plans, and specifications; that it shall in no manner or degree affect, modify, alter, omit, or vitiate any provision or requirement of said contract, plans, or specifications, except as specifically stated; that each and every provision and requirement of said contract, plans, and specifications shall remain in full force and effect and shall be applicable to and govern all actions, operations, and transactions on or in connection with the construction and completion of said work, except as otherwise specifically stated and provided; that nothing contained or stated in this agreement and nothing done or required under its terms shall operate or be held to annul, release, reduce, or otherwise affect the bond attached to the aforesaid contract, but the same shall be and remain in full force and virtue in the same manner and with like effect as though the modifications herein provided for had been included in and made a part of the aforesaid contract at the time of the execution of the same: Provided, however, that this agreement shall be accepted, signed, and sealed by the surety on the bond attached to the aforesaid contract, and said surety is hereby made a party to this agreement for the purpose of extending the obligation of said bond to cover the changes herein provided for.

44 "In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

"Signed, sealed, and delivered.

"In the presence of—

"W. N. CONCANNON,

"THE AETNA INDEMNITY CO., *Hartford, Conn.*,

"By J. D. MAXWELL, *Resident Asst. Secretary.*

"E. H. LESTOCK GREGORY, *Res. Vice Pres.*

"THE UNITED STATES,

"By MORDECAI T. ENDICOTT,

"*Chief of Bu. Y. & D., acting under the direction of the Secretary of the Navy.*

Concannon was informed before bidding that the structures contemplated by the advertisement above set out would be required to be built on the second recommendation and he made his bid with reference to that recommendation, and with the knowledge and understanding that he was to have the free use of all the material that had been delivered at the navy yard by claimant company as set out in paragraph 4 of said additional specification. The structures were built on said second recommendation and were completed on December 6, 1901. There was deducted in final payment to the contractor the sum of $186.56 to cover the cost of inspection from October 9, 1901, to date of actual completion.

XIII.

At least half of the first recommendation was firm ground which was part of the bluff or upland of Mare Island and natural ground. Such portion of the first recommendation as was low land had been filled in a longer time previously than the second recommendation. The ground at the second recommendation was originally tule marsh overflowed at high tide which in the summer and fall of 1897 had been covered to a depth of three feet with material pumped by a dredge from the bottom of the channel near by.

The ground at the first recommendation was rugged and uneven and part of it was a bluff which would have to be graded, and the cost of excavation would have been greater there than at the second recommendation.

There was no difference in the lengths and condition of the roads leading to the two recommendations which would have made the expense of hauling material to the second recommendation greater than to the first recommendation.

Piles of greater length and larger dimensions were required at the second recommendation than would have been required at the first recommendation, and it would have been more difficult and expensive to drive them. There was no other item of increase in cost which would have made the cost of erecting the buildings at the second recommendation greater than at the first recommendation.

Said second recommendation was a practicable and reasonable site upon which to erect a sawmill, boiler house, and steel chimney called for in the advertisement.

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XIV.

Up to the time of the annulment of the contract as hereinbefore set forth claimant had purchased and delivered at Mare Island Navy Yard certain materials suitable for and designed to become a part of the structures. Said material cost claimant, delivered at Mare Island Navy Yard, the sum of $16,688.97. For said material claimant had received from the United States as partial payments, in accordance with the contract, $15,434.32, by vouchers dated, respectively, July 5, 1899, August 6, 1899, September 12, 1899, October 3 and November 2, 1899.

Upon the reletting of the work as hereinbefore set forth defendant refused to allow claimant to remove said materials or any part thereof, and, in accordance with the specifications issued to intending bidders, offered the free use thereof to the successful bidder, against which claimant protested in writing. Said materials were used in the erection of the structures subsequently built by Concannon, and no payment therefor, other than as hereinbefore stated, was made to claimant by defendants or Concannon. Claimant's net loss on said material was $1,254.65.

XV.

On or before April 5, 1899, claimant delivered at Mare Island a pile driver, hoisting engine, and other tools. These tools were not used at that place except to drive the test piles hereinbefore referred to, and same remained there until January 30, 1901, when claimant was notified by the commandant to remove same. On June 25, 1900, a request by the claimant to be allowed to remove the pile driver and engine was denied.

The reasonable value of the use and deterioration of said pile driver, engine, and tools for said period of one year nine months and twenty-five days was $1,150.

Claimant also expended for freight in carrying said tools to Mare Island $36.31, and for repairs of said tools $3.60, making a total for use, deterioration, freight, and repairs of $1,189.91.

XVI.

Claimant incurred between December 21, 1898, and January 2, 1901, in connection with his operations at said place, the following expenses:

For wages of workmen in and about the delivery of materials and tools at Mare Island, and caring for same, $545.41.

For moving, by direction of Civil Engineer Hollyday, lumber purchased by claimant and stored at said yard for use in the structures contemplated by the contract, $51.

For amount expended in and about the testing of the soil under the two sites, $598.15, making a total under this finding of $1,194.56.

XVII.

If claimant company had erected the structures contemplated under the contract on the first site, no profits would have been realized.

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XVIII.

On February 28, 1901, the United States brought their action in assumpsit in the United States Circuit Court for the Eastern District of Pennsylvania against the claimant herein, the American Surety Company of New York, Albert Brown, and Thomas Prather as defendants, said action being numbered 80 of October session of 1902 in said court.

The American Surety Company was the only one of the defendants upon whom process was served and neither the claimant herein nor the other defendants in said suit voluntarily appeared or became parties to said suit. The president of the California Bridge and Construction Company, the claimant herein, appeared as a witness and testified in said suit.

The action was to recover from the surety company on the bond of the California Bridge and Construction Company the difference between the price which the United States was compelled to pay for the buildings of the structures and the price which claimant company had agreed to do the work.

Said surety company pleaded non assumpsit and special plea and based its defense on the alleged action of the United States in assuming to change the contract by changing the site for the buildings to be erected, to which change said surety company had not consented.

Said action was tried November 15, 1906, and the court submitted to the jury the question whether under the contract and the circumstances attending its execution the United States could require claimants to erect the structures contemplated by the contract at a site other than the first site. The jury brought in a verdict for the defendant surety company and judgment was entered accordingly. Subsequently plaintiffs moved for a new trial, which motion was overruled by the court December 7, 1906, from which action no appeal or writ of error was taken by the United States.

XIX.

Upon the bringing of suit in this court by the claimant defendants filed a counterclaim amounting to $35,607.32, in which they sought to recover the difference between what had been paid to Concannon to complete the contract and what claimants had agreed originally to complete it for, which difference the court finds was $13,157.32, and said sum was actually paid by the defendants in excess of what would have been paid the claimant under the original contract. Said sum of $13,157.32 included what was paid to Concannon under the original contract with him and under the four supplemental contracts thereafter made with him.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court concludes as a matter of law that the claimant is entitled to recover $1,254.65, the amount shown by finding XIV; that the claimant is not entitled to recover the amounts shown by findings XV and XVI; that the defendants are not entitled to recover upon their said counterclaim; and judgment is accordingly entered in favor of claimant in the sum of one thousand two hundred and fifty-four dollars and sixty-five cents ($1,254.65).

47 OPINION.

ATKINSON, J., delivered the opinion of the court:

This is a suit growing out of a contract entered into by the plaintiff company with the United States to erect a sawmill, boiler house, and steel chimney at the Mare Island Navy Yard near San Francisco, Cal., according to certain plans and specifications which are attached

to and form a part of the contract. Said contract and specifications are made a part of the petition in this case, to which reference is here made.

The contract was duly signed and executed on the 21st of December, 1898, but it did not provide for the exact location of the structures required to be erected on the navy yard property at Mare Island. It simply provided for the construction of said improvements at said navy yard. The findings show that it was tacitly understood that these proposed improvements were to be erected on a certain portion or part of the Mare Island Navy Yard property, but the definite location was thereafter to be left to the officials of the United States Navy in charge of the work. In accordance with the rules of the Navy Department a board of officers was assembled to inspect the premises and recommend to said department a site upon which the structures were to be erected by the contractors. It appears from the findings that the site selected by said board was not approved, and another site was subsequently recommended which was approved and selected as the site for the structures provided for in the contract.

It, however, further appears that prior to the submission of bids, the prospective bidders, including the plaintiff company, visited the navy yard premises and were informed by the naval officials that the exact site for said structures had not been definitely determined; that the location indicated by certain stakes was the point that had been recommended by a naval board, but it was liable to be changed to some other place within the limits of the navy yard. The report of the board recommending a location was not approved by the Navy Department, and the board was ordered to reassemble and select another location, which was accordingly done on December 27, 1898, six days after plaintiff company had signed the contract to construct the buildings; and on March 1, 1899, plaintiff company was advised that a permanent site had been chosen. Early in the month of May following one or more of its officers inspected the site that had been selected by the naval board and protested against being required to do the work at the place selected without additional compensation.

In the month of June following, the Bureau of Yards and Docks, acting under a provision in the contract, which gave to it the power to decide, refused to allow the claims of the plaintiff company for an increase in price above that which was fixed by the contract. Plaintiff company thereupon refused to proceed with the work, and on December 7, 1899, the Bureau of Yards and Docks directed the appointment of a board of officers to consider the case and report thereon.

It was thereafter agreed to allow plaintiff company six months' additional time to complete the work under its contract, but on March 16, 1900, it declined to proceed with the execution of its con-
48 tract, and on April 26 of said year a supplemental contract was prepared and presented to plaintiff company, which it also declined to execute; consequently, on January 2, 1901, the Bureau of

Yards and Docks declared the contract null and void, and immediately thereafter said bureau readvertised the proposed work and entered into a new contract with another party, who executed his contract according to its terms.

By reason of the alleged illegal annulment by the defendants of the plaintiff's contract, this suit has been instituted to recover from the United States alleged losses on materials, wages of men employed, time and expenses of officers and employees of plaintiff, general and office expenses chargeable to the contract, cost of changing location of material, cost of testing foundations of the two alleged sites for the construction of the required buildings and smokestack, and anticipated profits on the contract, aggregating $17,303.42. On the other hand, the defendants file a counterclaim of $35,607.32 as damages resulting from the failure of the plaintiff company to comply with the provisions of its contract.

The plaintiff company had given a bond to secure the performance of its contract, and a suit was brought thereon by the United States in the Circuit Court of the United States for the Eastern District of Pennsylvania, the plaintiff company and its sureties being named as parties defendant to said suit. Plaintiff company was not a resident of Pennsylvania and was not summoned to appear, and did not appear in that action, but proceedings were had against its surety—the American Surety Co.—with the result that there was a verdict and judgment in favor of the surety company.

At the outset, we are met with the contention of plaintiff that the question of breach of the contract is res judicata, because of the judgment in favor of the surety in the said suit in Pennsylvania. As stated by plaintiff's counsel, "the main question at issue is, Were the United States legally justified in annulling the contract"? and that issue, they urge, "has already been determined by a court of competent jurisdiction in a suit between parties privy to the parties herein and is therefore res judicata," and consequently there is nothing for the court to do but to assess the damages which plaintiff alleges to be due.

Having in mind the relation of principal and surety, the proposition that a judgment in favor of the surety should inure to the principal's benefit and work an estoppel in the latter's favor when sued upon its contract, would seem, upon the face of it, to be an unusual application of the rule relating to the binding effect of a judgment upon the parties and privies; but as counsel has urged with much earnestness that the defendants here are concluded by the judgment in favor of said surety, although the claimant was not a party to said suit or to the judgment rendered therein, we proceed to consider the question in the light of the authorities involved therein.

The general rule is that where an action is brought in a court of competent jurisdiction, a judgment rendered thereon is conclusive in a subsequent action between the same parties or their privies upon the same subject matter in the same court or another court of concurrent jurisdiction. The maxim of the law is "nemo debet bis

vexari pro una et eadem causa," and the reason of it as stated in Broom's Legal Maxims, 329, is that "to unravel the grounds
49 and motives which may have led to the determination of a question well settled by the jurisdiction to which the law has referred it would be extremely dangerous; it is better for the general administration of justice that an inconvenience should sometimes fall upon an individual than that the whole system of law should be overturned and endless uncertainty be introduced." Confirmatory of this statement it was said by Mr. Justice Clifford in City of Aurora v. West (7 Wall. 82): "Courts of justice, in stating the rule, do not always employ the same language, but where every objection urged in the second suit was open to the parties within the legitimate scope of the pleadings in the first suit and might have been presented in that trial, the matter must be considered as having passed in rem judicatum and the former judgment in such a case is conclusive between the parties." It was also held in Packet v. Sickles (24 How. 341) that "the essential conditions under which the exception of the res judicata becomes applicable or the identity of the thing demanded, the identity of the cause of the demand and of the parties in the character in which they are litigants." Aspden v. Nixon (4 How. 467). In Northern Pac. R. Co. v. Slaght (205 U. S. 122, 131) it was said that "the general rule of the extent of the bar is not only what was pleaded or litigated but what could have been litigated or pleaded. In Fayerweather v. Ritch (195 U. S. 276) the following language is adopted from Cromwell v. Sac County (94 U. S. 353), which is denominated a leading case:

"The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented is strictly accurate when applied to the demand or claim in controversy. Such a demand or claim having passed into judgment can not again be brought into litigation between the parties in proceedings at law upon any grounds whatever." (Western v. New Orleans, 177 U. S., 390, 397.)

The rule is thus applicable to the questions actually litigated and to those within the legitimate scope of the pleadings in the cause whether actually raised in the particular case or not.

It is to be noted, however, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, because the estoppel in the latter case operates "only as to those matters in issue or points controverted upon the determination of which the findings or verdict was rendered." (Keokuk & West R. Co. v. Missouri, 152 U. S., 301, 315; Cromwell v. Sac County, 94 U. S., 351.) The general rule has been stated in this court to be that parties and privies are concluded by a judgment of a court of competent jurisdiction upon every material issue clearly

presented by the pleadings, tried by the court, and judgment rendered thereon. (Langston's case, 26 C. Cls., 256; Braden's case, 12 C. Cls., 164.)

Confessedly, the plaintiff company was not a party to the Pennsylvania case mentioned, but its counsel contends that it is privy to the defendant therein, who was in fact the surety on its bond given to the United States for the faithful performance of its contract. It was a stranger to that suit and as such is not entitled to plead
50 the estoppel relied on here, unless it be that it was in privity with its said surety.

When it is said that a judgment binds parties and privies, the reference is, generally speaking, to privies in law and not to a privity by contract or deed. The plaintiff was not a party to the Pennsylvania case and was the principal in the bond there sued upon, and therefore the relation between these parties was that of principal and surety, which relation was created by contract. "If there be any privity between them it is that of contract, which is not admitted to be sufficient by any court or authority whatever." (Masser v. Strickland, 17 Sarg. & Rawle, Pa., 359.) In that case it was distinctly ruled that whilst a judgment against a constable for official misconduct is conclusive against his sureties as to the misconduct and quantum of damages, it is not res judicata against the sureties so far as preventing them interposing personal defenses.

In Brown v. Chaney (1 Kelly, Ga., 410) is a careful analysis of the question wherein the court defines privies to be "those who are so connected with the parties in estate or in blood or in law as to be identified with them in interest and consequently to be affected with them by the litigation, as lessor and lessee, heir and ancestor, executor and testator; all others not included in either of these classes are, of course, strangers," and consequently the court declined to apply the rule of res judicata in a case where the indorser was sued and who attempted to rely upon a prior judgment in favor of one of the makers. After discussing the authorities and pointing out that a judgment against the principal (there being no fraud or collusion shown) may be prima facie evidence of the amount of the damages, the court thus concludes: "But to hold that a judgment is conclusive upon third persons would be to overturn a uniform course of decisions from the Year Books to the present day."

In Douglass v. Howland (24 Wend., 35) the court discusses the meaning of privity in reference to parties to a cause; collates the authorities upon the effect of a decree against the principal in a subsequent action against a guarantor, and adds: "It is admitted in the books cited that the verdict is not only evidence against the immediate parties, but against all claiming under them, which very nearly expresses the meaning of the word privy when used to signify those persons off the record who may be affected to the same extent as if they were parties. It means anyone who takes the subject matter of litigation after the suit is determined or, in some cases, while it is pending. He is either privy in blood, as an heir on whom

the estate in litigation descends; a privy in estate, as one who takes by conveyance; or a privy in law, as one who takes a right of dower. In all these cases the reason is obvious; the heir purchaser, etc., always comes in subject to any act or default of the predecessor by which the title may have been affected. But subject to this exception the law is extremely jealous of the rights of all who are not actual parties, even though they may appear and be made so."

"Privity denotes mutual or successive relationship to the same rights of property, or, as is said in Bigelow on Estop., p. 142, the 'ground of privity is property and not personal relation.'" (The Stanwood, 19 Fed. 577.) "A privy to a judgment or decree is one whose succession to the rights of property thereby affected occurred after the institution of the particular suit and from a party thereto." (Orthwein v. Thomas, 127 Ill. 554; 11 Am. St. R. 159, 171.)

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Defining the term privity, the court in Gittinan v. Strong (14 P. F. Smith, Pa. 246) says, "It is the right to represent which creates privity in law as between ancestor and heir, decedent and administrator, etc., but clearly the principal in an action against himself alone can not represent the surety;" and further, "The privity of the surety with his principal is in the contract alone and not in the action." To the same effect is Park v. Ensign (66 Kans., 50, 97 Am. St. R., 352, and cases there cited; Hartley v. Phillips, 198 Pa. St., 9; Pennington v. Hunt, 20 Fed., 195; City of Lowell v. Parker, 51 Mass., 309, 315; Morris v. Lucas, 8 Blachf. Ind., 9; 1 Freem. Judgts., sec., 162; Wells Res Judicata, sec. 87 et seq., and other cases supra).

The authorities we have cited are sufficient to establish the proposition that the plaintiff company and its surety were not privies in such sort that the judgment of the Federal court in Pennsylvania in favor of the plaintiff's surety will warrant it in setting up said judgment as res judicata in this action wherein it is suing for damages for an alleged breach of the contract between it and the United States. And upon principle it can not be claimed that because a fact was in issue in an action against the surety the opposite party is concluded by the judgment therein when the principal is being sued, or when, as in this case, the principal seeks to take advantage of a judgment in its surety's favor.

The relationship existing between principal and surety is well understood in the law. As affects the obligee, they may both or either be bound, but as between themselves one is primarily and the other secondarily bound. The surety is allowed to interpose defenses which are not available to the principal. Their interests are not always identical (Gittinan v. Strong, 64 Pa. St., 246). The principal obligor and the obligee may agree to a valid extension of the bond or of the time in which a contract is to be performed, but if the surety does not agree to such extension he will be released. The principal may agree to an alteration of material parts of the contract and remain bound, but the surety, not consenting, may by such

changes be released. The surety's undertaking in the present case was that the claimant would do certain work under the contract between the parties, and was not that the surety would do the work. The rights of the United States are therefore based both upon the contract and the bond.

When a judgment rendered against the principal is admissible against the surety in a subsequent action by the creditor against the surety, it is not admitted upon any theory of privity, but as a link in the proof of a case against the surety, and ascertaining as it does the liability of the principal it may fix the quantum of damages for which the surety is answerable. But it does not preclude the surety from making personal defenses. (Douglas v. Howland, 24 Wend., 35.) As was said in Deck v. Johnson (30 Barb., 283, 290): "A judgment in favor of a surety against the condition in a separate action by the latter against the former would not affect the rights of the condition against the principal debtor, because such a judgment would not necessarily extinguish the debt, and such principal debtor would be neither party nor privy to the action." It is allow-
52 able, where material and where the pleadings do not sufficiently show it, to prove by extrinsic evidence consistent with the record that a certain fact, right, or question was litigated in a cause between parties in a prior action (Miles v. Caldwell, 69 U. S., 35; Fendall's case, 14 C. Cls., 247), and claimant has introduced herein depositions given by witnesses in the said suit in Pennsylvania. We agree with counsel for plaintiff that the pleadings in said cause taken in connection with the charge of the court therein show sufficiently the questions at issue, and whilst we do not exclude the testimony offered for said purpose, we take occasion to say that the method adopted for making such proof is not the approved practice, but the fact, right, or issue sought to be proven must be shown by evidence relating thereto and not by the testimony adduced at the hearing of the case, because it unnecessarily encumbers a record to bring into it the testimony of witnesses in another proceeding much of which is immaterial upon the matter sought to be proven.

It is unnecessary for us to discuss the Pennsylvania case, because, as has been stated, we hold that the judgment there is not conclusive upon the defendants to this suit.

Plaintiff's second contention is that the United States were not justified in annulling the contract for plaintiff's failure to comply with its terms, because of an alleged change of the site upon which the buildings were proposed to be erected. The contract contains the following provision with respect of annulment: "If said parties of the first part shall fail in any respect to perform this contract on their part, it may, at the option of the United States, be declared null and void, without prejudice to the rights of the United States to recover the defaults herein or violations hereof, and that for such default the United States may demand and recover of said parties of the first part and their representatives aforesaid as liquidated

damages a sum of money equal to the penalty of the bond forming part of this contract."

Section 8 of the specifications, which also authorizes the annulment of the contract should certain conditions arise, is in the following words: "If at the close of any month the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the officer in charge of the work shall so report to the commandant, and the Government shall have the power to refer the matter to a board of three officers, and if recommended by them and the interests of the Government so require the Government shall have the right to annul the contract and complete the work in such manner as is deemed best at the expense of the contractor and his sureties."

Although plaintiff company contends that it was justified in refusing to comply with its contract because of an alleged change in the location of the site for the buildings, it is shown by Finding IV, when a prospective site was pointed out to a member of the plaintiff company by a Navy official, yet he was informed by said officer that the site for the buildings had not been definitely determined, and that the same could not be finally decided until such action was approved by the Navy Department. Hence it is definitely shown that the site inspected by prospective bidders was only tentative, and as shown by the findings had only been recommended by the local
53 naval board, but that the matter had to be referred to the Navy Department for approval or disapproval. The same was accordingly referred and was disapproved by said department, and another and permanent site was definitely selected under the directions of the Navy Department, upon which the buildings were to be constructed.

Plaintiff company purchased certain materials and proceeded to the work of carrying out its contract; and not until May 10, 1899, one hundred and forty days after signing the contract, as set forth in Finding X, was any objection raised or protest offered to carrying on the work at the site selected by the Navy Department.

The advertisement for bids was for the construction of certain buildings at the Mare Island Navy Yard. The contract which plaintiff company signed was for the construction of these buildings at said navy yard. If the contracting company based its proposal upon the theory that the buildings were to be constructed at a particular point in the navy yard, it should have demanded that the contract should so state at the time it was submitted to it for execution. The rule is elementary that all prior negotiations are merged in the written contract, and that such contract is presumed in law to express the final understanding of the parties signing it, and that prior understandings can only be referred to for the purpose of explaining and construing uncertain terms of the contract. (Brawley's case, 96 U. S., 168, 173.) See also Simpson v. United States, 172

U. S., 372, 379; Griefen v. United States, 43 C. Cls., 107; Callahan Construction Co. v. United States, 47 C. Cls., 177.

In the Simpson case above cited the contract was for the building of a dry dock upon an "available" site, and in that respect it is not materially different from the contract under consideration. As said by the Supreme Court (p. 380): "The contract imposed upon the contractors the obligation to construct the dock according to the specifications within a designated time for an agreed price upon a site to be selected by the United States. We look in vain for any statement or agreement or even intimation that any warranty, express or implied, in favor of the contractors was entered into concerning the character of the underlying soil."

The contention in the case at bar that a certain site had been selected is not sustained by the findings of fact, and it is certain that no sort of test had been made of the soil underlying the location as first recommended or the location as secondly recommended. In the Simpson case it appeared that a test had been made, and it was insisted that the contractors were influenced in making their bids by that test, but the Supreme Court said (p. 381): "The fact that the bidders knew that a test of the soil in the yard had been made, and drew the contract providing that the dock should be located on a site to be designated by the United States without any express stipulation that there was a warranty in their favor that the ground selected should be of a definite character, precludes the conception that the terms of the contract imposed such obligation on the Government in the absence of a full and clear expression to that effect, or at least an unavoidable implication."

The plaintiff company after making the contract, and as early as January 19, 1899, seems to have known, regardless of its claim to the contrary, that there was to be a change in the location of the
54 buildings, because at that time its president stated: "As soon as you are able to notify us that the changed location of the buildings has been definitely fixed we will immediately commence work on the foundation." And thereafter, on March 1st, a formal notice was given to the plaintiff that the site of the sawmill had been selected and that the contractors were at liberty to start work as soon as they desired. They immediately replied that they were pleased to learn that the site had been selected, and that work thereon would be commenced, adding: "In the meantime, will you kindly inform us whether the original site was finally decided upon, and if not, where the new location is?" These statements are utterly inconsistent with the claim that the plaintiff company did not understand in the beginning of the negotiations that the site had not been definitely selected. This conclusion is fortified by the conduct of the plaintiff company in proceeding with arrangements for doing the work after the site had been selected and without complaint until some time in May following.

"Light is thrown upon the plain meaning of the contract by the conduct of the parties in the execution of the work. It is not pre-

tended that, when the character of the subsoil was discovered, the slightest claim was preferred that this fact gave rise to an extra allowance. The fact is that the contractors proceeded with the work, obtained delay for its completion, made their final settlements, and received their last payment without ever asserting that any rights which they now claim were vested in them. Without deciding that such conduct would be decisive if the claim was supported by the contract, it is nevertheless clear that it affords a just means of adding forceful significance to the unambiguous letter of the contract and the self-evident intention of the parties in entering into it." (Simpson's Case, supra.)

The work was not done by plaintiff company in this case as in the Simpson case, but the principle stated in the quotation above is applicable here.

We allow nothing on account of the defendant's counterclaim because we think that the changes in the specifications made by the subsequent contracts with Concannon resulted in material and substantial alterations in the work which claimant had undertaken to perform. In other words, that the Government after notifying the claimant of its purpose to have the work done and hold claimant for the difference between what it would cost the defendants and the original contract price did not complete the work in substantial compliance with the original plans but changed them in material features. The right secured by the original contract to make changes in the specifications and providing for a method of ascertaining the compensation to be paid in event of changes should not be extended into the new arrangement so far as the rights of the original contractor are concerned. When the Government took over the work and let a new contract, its rights and those of the original contractor were fixed by the law applicable to the rights and liabilities then existing. The Government could then sue for a breach of the contract or could have the work done and charge the contractor for the cost in excess of the original contract price. But electing to do the latter the Government must show that the work was done by another contractor under a contract and specifications which did not materially or substantially depart from the old contract and specifications. To allow the Government under the provisions of the original contract or specifications the right to make material changes in the specifications resulting in substantial alterations of the buildings as originally contemplated, would be in effect to say that any sort of changes or alterations could be made after the declared breach. (Axman's Case, 234 U. S., 36; McMullen's Case, 222 U. S., 460; O'Brien's Case, 220 U. S., 321.)

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Our conclusion is that judgment shall be entered in favor of the plaintiff company against the United States for the sum of $1,254.65, as shown by finding XIV. All other claims, including the defendants' counterclaim, are dismissed.

HOWRY, J., took no part in the trial and decision of this case.

56 VIII. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the 4th day of January, 1915, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that the claimant, California Bridge and Construction Company, do have and recover of and from the United States the sum of one thousand two hundred and fifty-four dollars and sixty-five cents ($1,254.65), the amount shown by finding XIV; that the claimant is not entitled to recover the amounts shown by findings XV and XVI; that the defendants are not entitled to recover upon their counterclaim; and judgment is accordingly entered in favor of claimant in the sum of one thousand two hundred and fifty-four dollars and sixty-five cents ($1,254.65).

BY THE COURT.

IX. *History of proceedings after entry of judgment.*

On June 1, 1915, the defendants filed a motion for a new trial, which was sent to the court without argument.

On October 11, 1915, the motion of defendants for a new trial was overruled.

57 X. *Application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 11th day of October, 1915, in favor of claimant, the defendants, by their Attorney General, on the 20th day of October, 1915, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed October 20, 1915.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

October 20, 1915.

XI. *Application for, and allowance of, cross appeal.*

CROSS APPEAL.

From the judgment rendered in this cause, the California Bridge and Construction Company, claimant, makes application for and gives notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys of Record.

Filed October 22, 1915.

Ordered: That the above cross appeal be allowed as prayed for.

BY THE COURT.

October 25, 1915.

58 CALIFORNIA BRIDGE AND CONSTRUCTION Company
vs.
THE UNITED STATES.

No. 29916.
Court of Claims.

I, John Randolph, assistant clerk Court of Claims, certify that the foregoing are true transcripts of pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, and conclusion of law and opinion of the court; of the judgment of the court; of the history of proceedings after entry of judgment; of the defendant's application for, and allowance of, appeal; of the application for, and allowance of, cross appeal by claimant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court of Claims, this 27th day of October, A. D. 1915.

[SEAL] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsed on back:) File No. 24981, Court of Claims. Term No. 278. The United States, appellant, vs. California Bridge and Construction Company. File No. 24982. Term No. 279. California Bridge and Construction Company, appellant, vs. The United States. Filed November 8th, 1915. File Nos. 24981 and 24982.

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In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
v.
CALIFORNIA BRIDGE & CONSTRUCTION Company. } No. 278.

CALIFORNIA BRIDGE & CONSTRUCTION Company
v.
THE UNITED STATES. } No. 279.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit grew out of a contract entered into December 21, 1898, to construct a sawmill, boiler house, and steel chimney at the navy yard, Mare Island, Cal. Before making a bid the president of appellee company visited the navy yard, examined the plans, specifications, maps, and blue print of the project, and was shown a tentative site for the structures, which, for convenience, was

designated as the "first recommendation" by the board appointed by the Bureau of Yards and Docks to recommend a location. He was then informed (Finding IV, Rec. 28) that "the site of said structure was not definitely fixed;" that the tentative location had been recommended, but not approved by the Navy Department, and that it was liable to be changed to some other place in the yard.

Appellee signed the contract on December 21, 1898 (Findings V and VI, Rec. 29), with the full knowledge that the location of the structures had not been definitely fixed. The site was selected March 1, 1899, and appellee notified, but made no objection to the [redacted] location until May 10 following. For approximately two years after the contract was signed negotiations were carried on between the parties whereby the Government sought to induce appellee to erect the structures in accordance with the terms of the contract. The latter refused to do so, and finally on January 2, 1901, under instructions of the Secretary of the Navy, the said contract was declared "null and void." (Finding XI, Rec. 38.)

The amount involved in the contract was $55,939. Up to the time of default appellee had delivered material on the ground to the value of $16,688.97. For this material it had received $15,434.32 from the Government, leaving a balance of $1,254.65. (Finding XIV, Rec. 46.)

On April 8, 1901, the Government relet the contract to William N. Concannon (Finding XII, Rec.

39), whose bid was $54,472. The contract was identical with that entered into originally, except as to price, date, and names of parties. Concannon was informed before bidding of the requirement that the structures be built on the place designated as the "second recommendation," and was advised that he should have the free use of all material delivered by appellee. (Rec. 40, 45.) Subsequently the following changes were made:

(1) Supplemental agreement 909–A, made May 31, 1901 (Rec. 40). This change related to the size of the piles and the penetration thereof and was a modification of paragraph 24 of the specifications. As the change affected the cost in excess of $300, it was submitted to a board of officers for adjustment as to cost, which resulted in a decrease of compensation in the sum of $2,781.31.

(2) Supplemental agreement B (Rec. 42), entered into July 23, 1901, related also to piles, increasing the number of a certain class provided in supplemental agreement A from 174 to 184 at $12.76 each, or $127.60. The amount of increase being less than $300, no board was assembled to fix the amount of compensation. By agreement of the parties the amount was fixed at $127.60.

(3) Supplemental agreement C was entered into August 17, 1901 (Rec. 43), and changed the foundation in east and west brow from concrete piles to redwood lumber. This change was approved by the Bureau of Yards and Docks, and the increased compensation was fixed at $292.45.

(4) Supplemental agreement D entered into October 31, 1901 (Rec. 44), provided for change in the position of stairway leading to and from the boiler room, the contractor agreeing to make the change without any increase or decrease of compensation. As this item did not affect the total cost no further reference will be made thereto.

All of these changes were reduced to writing and were otherwise in accordance with the terms of the contract providing for changes.

Appellee brought suit to recover alleged losses of materials, wages of men, time and expenses of officers and employees, general and office expenses, cost of changing location of material, testing of foundation of the two sites, and anticipated profits (Rec. 3) aggregating $17,303.42.

The Government filed a counterclaim for $35,607.32 (Rec. 20) containing an item of $13,157.32, being the difference between the amount of the contract of the claimant company, the date it was annulled, $56,749, and the amount paid said company as advances, $15,434.32, plus the amount of contract of Concannon for completing the work, $54,472, and for liquidated damages in the sum of $22,450.

The Government's position is that appellee defaulted under the contract, and therefore it was rightfully relet to other parties; that had appellee done the work it would have been compelled to make the same changes under its contract that were made under the Concannon contract; that the changes under the Concannon contract were not material or

substantial; hence appellee should respond in damages in the sum of $13,157.32, the difference between the cost under its contract and the work as completed under the Concannon contract, and $22,450 as and for liquidated damages; that the Government should not be subject to damages for the cost of material delivered by appellee and not paid for, for the reason that under section 8 of the specifications the Government had "the right to annul the contract and complete the work in such manner" as it "deemed best at the expense of the contractor."

Appellee's position is that the question of the breach of the contract is res judicata because of a judgment in favor of its surety in a suit (Finding 18, Rec. 47) in the United States Circuit Court for the Eastern District of Pennsylvania in the case of *The United States* v. *American Surety Company* et al, but in which appellee was not a party, wherein the question was submitted to the jury as to whether the United States could require appellee to erect the structures on a site other than the first one; that since under this decision appellee did not have to construct on the second site, it did not breach the contract in failing to do so; that not having breached the contract, it was not liable for the difference between the cost of the work under its contract and the Concannon contract; hence the Government should respond in damages as alleged in its petition.

The Court of Claims held that the decision in the said Circuit Court was not res judicata of the matters in this suit; that while a site had not been selected

before the contract was signed, it refused to allow appellant's counterclaim because substantial alterations had been made in the work under the Concannon contract. It gave appellee judgment in the sum of $1,254.65, being the difference between the cost and the amounts paid on the materials delivered by appellee.

ASSIGNMENTS OF ERROR.

The Court of Claims erred—

First: In holding that the changes in the specifications resulted in substantial alterations in the work which appellant had undertaken to perform.

Second: In rendering judgment against the United States in favor of appellee for $1,254.65.

Third: In failing to render judgment in favor of the appellant on its counterclaim.

BRIEF OF ARGUMENT.

I.

Under the terms of the contract the Government lawfully declared the same forfeited. Appellee thereby became indebted to the United States for the difference between the cost under its contract and the Concannon contract, and for liquidated damages.

II.

The work performed by the subsequent contractor (Concannon) would have been required of appellee under its contract had it completed the same. There was no material or substantial change under the Concannon contract.

ARGUMENT.

FIRST.

Under the Terms of the Contract the Government Lawfully Declared the Same Forfeited. Appellee Thereby Became Indebted to the United States for the Difference Between the Cost Under its Contract and the Concannon Contract, and for Liquidated Damages.

The Government maintains that if the contract was lawfully forfeited, then appellee is subject to damages for the difference between the cost under the first and second contracts.

The contract was executed December 21, 1898. The work was to be completed within six months. The site was selected March 1, 1898. Under the contract the Government had the power to select the site. The place chosen was (Finding 13, Rec. 46) a "practicable and reasonable" site upon which to erect a "sawmill, boiler house, and steel chimney called for in the advertisement," and "there was no difference in the lengths and conditions of the roads leading to the two recommendations which would have made the expense of hauling the material to the second recommendation greater than to the first recommendation." No complaint was made regarding the site by appellee (Finding X, Rec. 32) until 140 days after signing the contract. Under the finding appellee is excused for delays until June 24, 1899. From that time until the declaration of forfeiture on January 2, 1901, a period of approximately 18 months, the delay was due "to the action of the con-

tractors in not proceeding with their work according to the contract" (Finding XI, Rec. 36). All that the appellee had done during this period of time was to deliver material in the sum of $16,688.71, a pile driver, hoisting engine, and other tools on the grounds, drive five test piles, and make one boring.

On January 2, 1901 (Rec. 38) a board was duly convened and recommended the forfeiture of the contract because of delays, after having given appellee a hearing and received its written argument. This report was approved by the chief of the bureau, and, acting under the instructions of the Secretary of the Navy, he notified appellee that the Government exercised the option reserved to it by the contract to declare the same null and void so far as appellee was concerned, and that bids would be advertised to complete the work. As there is no charge of bad faith on the part of the Navy Department in declaring the contract forfeited, there can be no question that the chief of the bureau, acting for the Secretary of the Navy, had the power to and did lawfully declare the forfeiture under paragraph 8 of the specifications:

> 8. *Progress of work.*—If at the close of any month the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the officer in charge of the work shall so report to the commandant, and the Government shall have the power to refer the matter to a board of three officers, and, if recommended by them and the interests of the Government

> so require, the Government shall have the right to annul the contract and complete the work in such manner as is deemed best, at the expense of the contractor and his sureties.

It follows that under paragraph 8 the Government had the right to see that the work was completed "at the cost of the contractor and his sureties," which expense in this instance was the difference between the cost under this contract of appellee and that under the Concannon contract, to wit, $13,157.32.

The second item in the counterclaim is for liquidated damages for delay in completing the work. The contract provides:

> If said parties of the first part shall fail in any respect to perform this contract on their part, it may, at the option of the United States, be declared null and void without prejudice to the right of the United States to recover for defaults herein or violations hereof, and that for such default the United States may demand and recover from said parties of the first part and their representatives as aforesaid as liquidated damages a sum of money equal to the penalty of the bond forming a part of this contract.

The specifications provide:

> 12. Deductions for delay.—In case the completion of the work shall be delayed beyond the time fixed upon for the completion of the contract, deductions of $25 per day as liquidated damages during such delay may, in the discretion of the Secretary of the Navy, be

made from the contract price of said work. (Rec. 9.)

Appellee's contract time expired June 21, 1899. This time was extended for a period of six months from February 20, 1900, or until August 20, 1900. The contract was annulled January 2, 1901. The work was finally completed by Concanon December 6, 1901. The three periods are as follows:

June 21, 1899, to Aug. 19, 1900, inclusive, 425 days, at $25 per day	$10,625
Aug. 20, 1900, to Jan. 2, 1901, inclusive, 135 days, at $25 per day	3,375
Jan. 3, 1901, to Dec. 6, 1901, inclusive, 328 days, at $25 per day	8,450
Total amount of liquidated damages	22,450

(Rec. 20, 21; also Finding V, Rec. 29; Finding XI, Rec. 36–38; Finding XII, Rec. 44–45.)

This comes clearly within the rule laid down in *United States* v. *Bethlehem Steel Company*, 205 U. S., 105, and *Sun Printing and Publishing Association* v. *Moore*, 183 U. S., 642.

In the court below an attempt was made to meet the Government's contention that appellee had subjected itself to damages in the amount of the excess cost of completion because of its default. It asserted that the question as to whether the United States was legally justified in annulling the contract had already been determined by a court of competent jurisdiction in a suit between parties privy to the parties herein and was therefore res judicata, and consequently there was nothing for the court to do

but assess damages to pay the claim. It appears from the record (Finding 13, Rec. 47) that the suit brought by the United States against the surety company was upon an action in assumpsit in the United States Circuit Court for the Eastern District of Pennsylvania. The American Surety Company of New York was the only defendant upon whom process was served. Appellee was not a party to the suit nor did it appear voluntarily. The findings say the surety company based its defense on the alleged action of the United States "in assuming to change the contract by changing the site for the buildings to be erected, to which change *said surety company had not consented.*" The question as to whether the "United States could require claimant to erect the structures contemplated by the contract at a site other than the first site" was submitted to the jury. The latter brought in a verdict for the defendant company.

In the circuit court the surety could have interposed defenses which would not have been available to appellee had it been a party. In its opinion the Court of Claims says (R. 53), "The surety is allowed to interpose defenses which are not available to the principal."

This is readily demonstrated by an instruction of the court which was quoted in the Government's brief in the court below (p. 606):

> Now, you must remember that this is not a suit against the California Bridge Company at all. That is a California corporation. It

> never has been served with process and could not have been served with process from this district; it has not voluntarily appeared, and therefore the California Bridge Company is not concerned—I mean to say is not a party to this suit at all. The only person served, the only defendant served, was the American Surety Company, the surety company, and it is only the surety company upon that bond that is before us; *and therefore we have only the rights of the surety company to consider, and it very often happens that the right of the principal to a contract and the right of the surety are altogether different, and it is important or may be important therefore to keep distinctly in mind which is the party to the particular issue being tried.* Now, I repeat the issue here is simply against the surety. The United States is suing upon that bond and the surety company is the only person whose rights are involved.

The findings say (R. 48) that the court submitted the question to the jury and the jury brought in a verdict for the defendant surety company and judgment was entered accordingly. The court does not say that this was the only question and the one on which the verdict was based. It would appear from the foregoing quotation that there were other questions presented to the jury.

In the lower court the question of res judicata was briefed with great industry and research by appellee, but it was unable to find a single authority in point on the proposition that appellee was in privity with

the American Surety Company, defendant in the circuit court. Counsel relied upon the case of the United States *v.* The Atlantic Dredging Company, tried in the United States Circuit Court for the Eastern District of New York. Subsequently the Atlantic Dredging Company sued the United States in the Court of Claims and the decision in the circuit court was declared res judicata of the matters raised in the Court of Claims. The parties, however, were precisely the same in both cases, and the proof shows that the issues were the same and they sued in the same right. (35 C. Cls., 463, 483.) In discussing the subject of parties and privies in the lower court counsel quoted in his brief from section 523, 1 Greenleaf on Evidence. He failed, however, to refer to the section following of the same work which explains and limits the rules as to the admissibility of a judgment in evidence. (1 Greenleaf on Evidence, sec. 524.)

In Bigelow on Estoppel (pp. 137–138), in discussing the case of *Pritchard* v. *Hitchcock* (6 Man. & G., 151, 6 Scott, N. R. 851), the author says:

> The decision shows that in the relation of guarantor and principal no privity, in the sense in which the law of estoppel is applied, exists; and the same is true by the weight of authority of the relation of surety and principal, cosureties *inter se*, principal and agent, and the like cases where parties are answerable over. There is no succession of rights and duties to the new party in such cases.

See also Am. & Eng. Enc. Law, vol. 27, p. 455, and cases there cited; *Sheehy* v. *Mandeville and Jamesson* (6 Cranch, 253).

It is inconceivable that the judgment relied upon could be held to be an estoppel in any sense or to any extent, but admitting, for the sake of argument and for no other purpose, that it does create an estoppel, the bar would be limited to that which was actually litigated and determined, because the action in this case is upon a different claim and demand.

Virginia-Carolina Chemical Co. v. *Kirven*, 215 U. S., 252 (257).

Cromwell v. *County of Sac*, 94 U. S., 351.

The Northern Pac. Ry. Co. v. *Seaght*, 205 U. S., 122.

The purpose of the former suit was to recover of and from the American Surety Co. as surety on claimant's bond in the penal amount of said bond ($11,200) for the failure on the part of the claimant to perform its contract. The purpose of the suit at bar is the recovery on the part of the claimant of certain expenses incurred in and about preparing to carry out the said contract, and also for prospective profits.

Suffice to say that regardless of what facts were presented to the jury in the Circuit Court, its decision and the judgment entered thereon can not be res judicata of the matters before this court in the instant case, for the reason that appellee was not a party or in privity with the defendant in the case in the Circuit Court, and hence it can not plead the estoppel relied on here. Whatever relation it bore to the

defendent in the former action was one of contract. This whole matter has been discussed very thoroughly and the authorities citied in full in the opinion of the lower court and the conclusion of that opinion is that the judgment was not a bar to the defendants in this suit.

SECOND.

The work performed by the second contractor (Concannon) would have been required of appellee under its contract had it completed the same.

The Court of Claims says (Rec. 57): "We allow nothing on account of the defendant's counterclaim, because we think that the changes in the specifications made by the subsequent contracts with Concannon resulted in material and substantial alterations in the work which claimant had undertaken to perform." The Government maintains that the question whether the changes were so material as to relieve appellee upon the forfeiture of the contract of the cost of completion of the same can be tested by two propositions:

First. The changes made in the specifications under the Concannon contract were such as would have been necessary had appellee completed the work under its contract.

Second. The changes did not result in material and substantial alterations in the work.

If the Government can sustain either of the foregoing affirmatives, then appellee is liable on the Government's counterclaim.

These two affirmatives are bottomed on the contract which gave the Government the power to locate the site at any reasonable point in the navy yard, and on Finding VI (Rec. 29), which discloses beyond a peradventure that appellee knew the Government had not selected the site when the contract was executed. The court states its view of this question (Rec. 56), where it says: "The contention in the case at bar that a certain site had been selected is not sustained by the findings of fact * * *."

Moreover (Finding 13, Rec. 46), the site chosen was "a practicable and reasonable one." The situation then at the time of the signing of the contract was that appellee was to construct the sawmill, etc., at a practicable and reasonable site to be located by the Navy authorities somewhere within the Navy Yard. Would not appellee, if he had completed the contract, been required to meet the exact conditions that Concannon met in building on this "practicable and reasonable site"? It appears that half of the ground on the first recommendation (Finding 13, 46) was firm, being part of a bluff or upland, while the lower part had been filled in for a long period. The site "of the second recommendation" which had once been a swamp had been filled in to a depth of 3 feet with dredged material. Naturally the foundation of the building would have been different on the second recommendation from that of the first recommendation, but since the location was a reasonable and practical one appellee would have been

required to meet the conditions just the same as did Concannon.

The unavoidable conclusion is that under paragraph 14 of the specifications and under the contractual power of the naval authorities to locate the plant upon a "practicable and reasonable site," appellee would have been required to do the same work as was done under the Concannon contract. Hence the changes under the latter contract can not be said to have been material and substantial.

But addressing itself to the second affirmative, the Government calls attention to the fact that the changes in the specifications were not material or substantial in that they did not enlarge the plant or change its purpose or affect its architectural contour. The only change was that necessary to meet the ground conditions.

For example, in Supplemental Agreement B (Rec. 42) the change was for an increase in the number of 10 piles at $12.76 each, or a total of $127.60, the amount being so small, and less than was required for the purpose of assembling a board to pass on the matter. Again in Supplemental Agreement C (Rec. 43) the change from concrete piles to redwood lumber increasing the compensation only $295.45. The only change in which it was required to assemble a board of officers because it was in excess of $300 related to the size of the piles and the penetration thereof, and was a modification of paragraph 24 of the specifications. The court found (Rec. 46) that

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there was no other item of increase in cost which would have made the cost of erecting the buildings on the "second recommendation" greater than on the "first recommendation."

Can these changes be said, even from a pecuniary point of view, to have been material and substantial and such as would have relieved appellee from the terms of the contract requiring it to pay any extra cost for completing the contract where it had defaulted? It will be noted that while the opinion of the lower court (Rec. 57) says that the changes were material and substantial, it fails to explain in what respect they were material and substantial.

The court below seeks to support its opinion by the case of the *United States* v. *Axman* (234 U. S. 36), but the contract and the facts in the Axman case differ radically from those in the case at bar. In the former case the dispute arose over a dredging contract—the dumping of spoil. Two things were required under the Axman contract—the contractor was to dredge the channel and was to deposit the spoil at a certain specified place. The latter was a requisite term in the contract. The Government declared the contract forfeited and relet the same for completion under a second contract. The stipulation respecting dumping of the spoil was materially changed. The court said:

> It (original contract) specifically made the place of dumping the spoil an essential and particular term of the contract. It is not necessary to inquire into the reason which

> actuated the Government in making this requirement. It therefore follows that not not only was Axman to dredge the channel as required by the contract, but he was to deposit the spoil as therein specified. Dredging the channel would not be enough to show performance of his contract, unless he complied with the other material requirement as to the deposit of the spoil. The new contract contained a different stipulation as to the dumping of the spoil. Upon the showing made in this case we think the change in the place of dumping the spoil was very material, and could not be made consistently with the terms of the agreement under which Axman undertook to perform the work or be liable as stipulated in paragraph 4.

In the Axman case the contractor had no alternative. He was to deposit the spoil at a certain designated place. It differs with the case at bar, for in the latter the Government had the authority to place the plant at a practicable and reasonable site anywhere within the confines of the navy yard. Moreover, the provision regulating changes was not observed in the Axman case. Under paragraph 6 of that contract they were to be in writing, by the contracting parties setting forth the changes and giving quantity and prices, to take effect only upon the approval of the Secretary of War. This provision was not complied with, and therefore no change or modification in the contract ever went into effect. In the case at bar all the changes were made in writing and in accordance with paragraph 14 on changes.

The lower court also cites the case of McMullen (222 U. S. 460), but does not distinguish that case from the Axman case. This court in the Axman case, discussing the McMullen case, supra, p. 44, said:

> The objection that the second contractor does not appear to have completed the work intended to be accomplished by the first, that is to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform.
>
> We thus observe that in the McMullen case it was found that the liberty given to the second contractor to dump in deep water did not change the contract, because in the first contract the Government reserved an absolute right of choice in this regard. In the present case there was no such right of choice.

The case at bar seems to be clearly within the rule laid down in the McMullen case. The situation in the present case with respect to the selection of a site resembles that in *Simpson* v. *United States* (172

U. S. 372). There the contract gave the Government power to select an "available site" for a dry dock. It turned out that the site selected was underlaid with quicksand and claimant brought suit to recover compensation for extra work and material made necessary by the quicksand. The court said (p. 381):

> The fact that the bidders knew that a test of the soil in the yard had been made, and drew the contract providing that the dock should be located on a site to be designated by the United States, without any express stipulation that there was a warranty in their favor that the ground selected should be of a defined character, precludes the conception that the terms of the contract imposed such obligation on the Government in the absence of a full and clear expression to that effect, or at least an unavoidable implication.

It will be seen from the Simpson case (supra) that the Government had practically the same discretion in locating the dry dock as it had in the selection of the site for the structures in the present case. The word "available" in the Simpson case is equivalent to the words "practicable and reasonable," which are the inferential words in the present case. As in the Simpson case, so here, there was no guaranty that the location would contain any particular kind of foundation and that the Government would be liable were it otherwise. So long as it was practicable and reasonable it met the requirements.

The work performed by Concannon being the same as would have been required of appellee had it finished the contract, and the changes not having been substantial or material, it is respectfully submitted that appellee is liable in damages for the amount of the Government's counterclaim, and the Government, under paragraph 8 of the specifications, is relieved of any charge for the use of materials on the part of the subsequent contractor which were delivered on the premises by appellee.

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SUPREME COURT, U.S.
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Supreme Court of the United States.

October Term, 1916.

THE UNITED STATES, *Appellant*,

v.

CALIFORNIA BRIDGE & CONSTRUCTION COMPANY

[redacted] 39

CALIFORNIA BRIDGE & CONSTRUCTION COMPANY, *Appellant*,

v.

THE UNITED STATES

[redacted] 40

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR CALIFORNIA BRIDGE & CONSTRUCTION COMPANY.

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Supreme Court of the United States.

October Term, 1916.

THE UNITED STATES, *Appellant*,

v.

CALIFORNIA BRIDGE & CONSTRUCTION COMPANY

No. 278

CALIFORNIA BRIDGE & CONSTRUCTION COMPANY,

Appellant,

v.

THE UNITED STATES

No. 279.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR CALIFORNIA BRIDGE & CONSTRUCTION COMPANY.

I. STATEMENT OF THE CASE.

These cases are an appeal and a cross-appeal from the judgment of the Court of Claims in a claim against the United States by the contractors for the erection of a saw-mill, boiler house and steel chimney at the Mare Island Navy Yard, California. The claim grows out of the circumstance that the naval authorities decided that the structures should be built upon a site other than that

which they had first had in contemplation. Claimants refused to build upon the site finally selected, the United States assumed to annul their contract, and claimants brought this action for the expenses they incurred in and about preparing to execute the contract and anticipated profits. The United States filed a counter claim.

The Pleadings.

The claimants, California Bridge & Construction Company, filed their petition in the Court of Claims, December 17, 1906, and their amended petition February 13, 1913, which claim damages amounting to $17,303.42, upon a contract made with the United States by the Bureau of Yards and Docks of the Navy Department, December 21, 1898, for the construction of a sawmill at the Mare Island Navy Yard, California. These damages were itemized as follows (rec. p. 3):

Cost of materials, including carriage	$16,688.97
Less partial payments thereon	15,434.32
Net loss on materials	$1,254.65
Use and deterioration of, freight, and repairs on plant and tools assembled for the work	3,314.91
Wages of men employed in sending to and delivering at Mare Island plant and materials, and caring for same there	545.41
Time and expenses of officers and employees of claimant	3,004.80
General and office expenses of claimant chargeable to this contract	1,068.50
Cost of changing location of material by order of the engineer, because of the delay	51.00
Cost of testing foundations of both sites	998.15
Anticipated profits	7,066.00
Total	$17,303.42

The United States, in addition to a general denial (p. 26) set up a counter claim (rec. pp. 20, 21) claiming liquidated damages for delay in completion of the work besides the excess in the cost of completion of the work under a new contract over and above the contract price which the United States had agreed to pay this claimant. The claimants replied to the counter claim (rec. pp. 21–23) contending that the government was estopped from setting up such a counter claim because the United States had sued the contractor and its sureties upon the same cause of action and judgment was rendered in favor of defendants therein. The claimants also denied any breach of contract on their part. They also claimed that they were not liable for the excess cost of completion because the contract with the new contractor was for different work from that which the claimants had agreed to perform. The government interposed a rejoinder to the claimants' replication (rec. pp. 24–26), setting forth that although the claimants in the case were made a defendant in the suit brought by the United States, they were not served with process nor did they voluntarily appear, and they were therefore not a party to the judgment nor entitled to plead the same as an estoppel. It also denied the averments of fact made by the replication. Various proceedings took place resulting in the end in a judgment in favor of the claimants for $1,254.65 (rec. foot p. 26). Findings of fact were made (rec. pp. 27–48). The opinion of the court was delivered by Judge Atkinson (rec. pp. 48–57), and is reported in 50 C. Cls. 40.

The Facts as Found.

Proceedings Up to Time of Execution of the Contract.

The first five findings (rec. pp. 27–29) give the facts leading up to the making of the contract. Chronologically stated these are as follows:

September 13, 1898, plans for the work covered by this contract were submitted to the Chief of the Bureau of Yards and Docks, Navy Department.

September 19, 1898, these plans were approved by the Bureau Chief (Finding II, rec. p. 27).

September 24, 1898, the Commandant of the Mare Island Navy Yard, under authority from the Bureau of Yards and Docks, appointed a board of officers to recommend a location for the structure.

September 30, 1898, specifications were submitted to the Chief of Bureau.

October 7, 1898, these specifications were approved by the Bureau Chief.

October 24, 1898, the Uuited States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, Navy Department, published the following advertisement:

"Sealed proposals, in duplicate, indorsed 'Proposals for the construction of sawmill, boiler house and steel chimney at the U. S. navy yard, Mare Island, Cal.,' will be received at the Bureau of Yards and Docks, Navy Department, Washington, D. C., until 1 o'clock p. m., on Saturday, November 26, 1898, and publicly opened immediately thereafter. Specifications and blank forms of proposals will be forwarded upon application to the bureau or the commandant of the U. S. navy yard, Mare Island, Cal. Bidders are expected to fully inform themselves of the character of the work by visiting the navy-yard, where plans may be examined and obtained. Appropriation for this work is $75,000.—Mordecai T. Endicott, Chief of Bureau. October 24, 1898."

October 29, 1898, the board which had been appointed to recommend a location reported as follows:

"The board has the honor to recommend that the proposed new sawmill be located as shown in the accompanying sketch marked 'B.' This sketch is a portion of the 'yard map.'"

The location so recommended is for convenience of reference called in the findings and opinion of the court the "first recommendation."

Said report was approved by the Commandant of the navy yard and was by him forwarded to the Bureau of Yards and Docks at Washington for approval or disapproval (Finding I, rec. p. 27).

At some time between October 29, 1898, and the date of the claimant's bid, November 19, 1898, a map and blue print had been made and were on file with plans and specifications in the office of the civil engineer at the navy yard for the examination of bidders. Upon this blue print was indicated by appropriate marks the "first recommendation" of the proposed structure, and into the ground at said "first recommendation" stakes were driven at points where would be the corners of said buildings if erected at that place (Finding II, rec. pp. 27, 28).

In response to the advertisement, and before making any bid, the president of the claimant company visited the navy yard with a view of making a bid upon the proposed work. He examined the plans and specifications, saw the map and blue prints, referred to in the last paragraph, and was shown by a duly authorized official at the navy yard the "first recommendation" of the proposed work. He was informed at the time by said official that the site of said structure was not definitely fixed; that the location indicated by certain stakes, which were pointed out to him, had been recommended, but that the recommendation had not been approved by the Navy Department; and that the location was liable to be changed to some other place within the limits of the navy yard.

November 3, 1898, at the request of the claimant company, Civil Engineer Hollyday, the civil engineer of the

Navy Department in charge of the work at the navy yard, sent the claimant a set of specifications and blue prints and a receipt for the same to be signed and returned. Said receipt stated that the plans and specifications and two sets of blank forms were received for the purpose of making proposal for erecting a sawmill, boiler house and steel chimney. In his letter transmitting same no mention was made by said civil engineer that the site for the buildings was undetermined or liable to change (Finding IV, rec. pp. 28, 29).

November 19, 1898, claimant company submitted a bid for the performance of the work advertised for the sum of $55,939, and said bid was accepted by the defendants for the "construction of sawmill, boiler house, and steel chimney at the United States navy yard, Mare Island, California, according to plans and specifications referred to in said advertisement."

December 6, 1898, claimants were so notified.

December 21, 1898, a contract was entered into between the claimant company as principal and the American Surety Company of New York, Albert Brown and Thomas Prather, as sureties. The contract and specifications forming a part thereof are contained in the record (pp. 5–19).

Material paragraphs of the specifications are as follows:

"7. Time of commencement of work.—The contractor shall commence the work within twenty days from the date of the signing of the contract and continue without interruption. The entire work to be completed in six calendar months from the date of contract."

"8. Progress of work.—If at the close of any month the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the officer in charge of the work shall

so report to the commandant, and the Government shall have the power to refer the matter to a board of three officers, and, if recommended by them, and the interests of the Government so require, the Government shall have the right to annul the contract and complete the work in such manner as is deemed best, at the expense of the contractor and his sureties."

"24. Round piles.—The round piles are to be of douglas fir, straight, free from large, loose, or rotten knots, falling or wind shakes, or other defects affecting their strength; they are to be from 8 to 10 inches at small end and 14 to 18 inches at the butt; they are to be of sufficient length so that when driven the penetration shall not exceed an average of ½ inch per blow for the last five blows of a hammer weighing 3,000 pounds falling 20 feet, or the equivalent thereof."

It was also provided in the contract proper (rec. p. 6) and specifications, par. 14 (rec. p. 9), that the government might make any changes deemed necessary or desirable in the plans and specifications, the increased or diminished compensation to be paid the contractor to be agreed upon in writing, but where the amount was in excess of a certain sum, it was to be fixed by a board of naval officers appointed for the purpose. The amount of this sum is stated in the contract proper (rec. p. 6) at $300, and in the specifications (rec. p. 9, par. 14) at $2,000.

Proceedings Under Contract.

The "first recommendation" previously stated as having been made by the board October 29, 1898, for the location of the proposed structure was, at some time not stated in the findings, disapproved by the Bureau and the board was reconvened to reconsider the matter of location.

December 27, 1898, or six days after the contract had

been signed, the board recommended another site for the structure to be built under this contract, styled throughout the findings and opinion of the court for convenience of reference, the "second recommendation."

January 5, 1899, this second recommendation was approved by the Chief of Bureau and the Commandant of the navy yard notified accordingly. This second recommendation was the site upon which the sawmill was subsequently built, though not by this contractor (Finding I, p. 27; Finding VI, p. 29).

January 19, 1899, the claimants notified defendants' engineer in charge at Mare Island that "in order to literally comply with par. 7 of your specifications" claimants had commenced work thereunder and stated, "As soon as you are able to notify us that the changed location of the buildings has been definitely fixed we will immediately commence work on the foundations."

February 16, 1899, claimants notified said engineer of the closing of a contract by them for the "structural steel for the sawmill and boiler house now under contract for construction by us at Mare Island," and asked to be notified as to shop inspection and shop drawings.

February 22, 1899, similar notice was given to and request made by claimants of the Chief of the Bureau of Yards and Docks at Washington.

March 1, 1899, claimants were notified by said engineer in charge: "The site for the sawmill has been selected and you are at liberty to start in work as soon as you desire."

March 2, 1899, claimants stated to defendants' said engineer: "We are pleased to learn * * * that the site for the sawmill, boiler house, etc., has been selected," and that work thereon would be commenced as soon as the necessary material could reach the ground," adding, "In the meantime, will you kindly inform us whether

the original site was finally decided upon, and if not, what the new location is?" (Finding VI, pp. 29, 30).

March 18, 1899, claimants inquired of said engineer relative to driving a few test piles to determine the length required.

March 31, 1899, a supplemental contract was made based upon the report of a board of naval officers for additional painting in the sum of $810 (Finding VIII, rec. p. 31).

April 10, 1899, claimants drove a pile at the southeast corner of the " first recommendation " and four piles at the " second recommendation." The first pile driven was 50 ft. long and 15" at the butt. The four piles driven at the " second recommendaiion " were respectively, 67, 71, 73, and 73 feet long. A boring was also taken by means of a water jet near the southwest corner where hard compact clay mixed with sand and gravel was found at 125 feet.

May 3, 1899, claimants' president, who was all along acting for claimants, notified defendants' said engineer in charge at Mare Island, of a desire to confer with him " regarding the conditions developed by the change in location," and forwarded tracings and blue prints of details of the work (Finding IX, rec. p. 32).

May 10, 1899, claimants addressed a communication to the commandant at the navy yard stating that upon signing the contract, and proceeding to commence work, claimants learned that a change in location was under consideration; that " On March 1st, 1899, we were notified that the new location had been determined upon," that the test work just referred to in driving piles and making a boring showed that the conditions at the new location were very different from what was expected. Instead of reaching a sufficiently firm bottom at approximately 45 ft. depth it was found that piles 72 feet long were

fully driven without finding stable bottom and the test made with the water jet and pipe showed that the desired foundation is not found at less than 123 feet; that the ground at the new location consists of low tule marsh, lacking the proper stability and containing water and mud to such an extent as will largely increase the cost of excavation, pumping, and work necessary to properly place the concrete, and asking that steps be taken to determine the increased or diminished compensation to which the contractor may be entitled by reason of the change in location and the consequent necessary changes in construction, etc., and also asking for an extension of four months' time for the completion of the work (Finding X, rec. pp. 32–34).

This letter is also summarized at the beginning of Finding XI, p. 35.

May 22, 1899, this protest was repeated and amplified.

June 13, 1899, the Bureau of Yards and Docks decided that claimants' contention as to change of site after the letting of the contract was not sustained; but "directed that the requirements of the specifications as regards diameter of piles and final penetration be waived so that sufficient length and bearing power might be secured for each pile as determined by the officer in charge" (middle p. 35 of record).

June 24, 1899, the civil engineer notified claimant that the specification for diameter of piles was waived and gave the contractor the penetration of piles for each particular case as determined by him.

June, July and August, 1899, no work was done and no piles were delivered, but considerable material was delivered at the works.

December 12, 1899, a board of three naval officers was appointed by direction of the Bureau of Yards and Docks to make full investigation and hear witnesses.

December 30, 1899, the board reported that the failure to complete the buildings within the time specified in the contract was due, first, to delay caused by the government's uncertainty regarding the site, which delay extended from December 21, 1898, to March 1, 1899; second, to awaiting a decision by the Bureau regarding dimensions and penetration of piles until June 24, 1899, when the contractor was notified that certain requirements would be waived; and third, from June 24, 1899, to date of the report, this last delay being due to the action of the contractor in not proceeding with its work in accordance with the contract. The board recommended that the contractor be called upon to begin work in accordance with modified plans and specifications within 30 days from the date he is notified of the Bureau's action, and that six months' extension of time from date of notification be allowed for the completion of the buildings.

February 7, 1900, the Bureau approved this report.

February 9, 1900, the Navy Department approved it.

February 20, 1900, claimants received notification from the Bureau that an extension of six months would be granted, conditioned upon a board being appointed at a proper time to consider whether or not the contractor was entitled to any increased or diminished compensation on account of the location being different from that upon which claimant based its bid. Claimant was also informed that said proposed board would probably not report until after the foundation had been completed.

March 16, 1900, contractor declined to agree to this proposition, but instead insisted that all claims for penalties and forfeitures should be abandoned; that a board should be appointed to determine in advance of the performance of the work, by means of tests, the expense of which should be borne equally by claimants

and the government, the increased or decreased cost of construction at the second site as compared with the first; and that it should be agreed that there was no open question whether said board should or should not adjudge the increased or decreased compensation. They also offered in the alternative to submit a money bid for the work at the second site.

April 24, 1900, the Navy Department decided that its previous decision should be modified so that the board be directed to determine, subject to the department's approval, the actual and just amount of the increased or decreased compensation the contractor would be entitled to receive on account of building the structures on the second site instead of on the first, and that the said board should be directed to make examination of the character of the foundations of the two sites.

April 26, 1900, the Chief of the Bureau of Yards and Docks transmitted to the contractor a draft of supplemental agreement drawn in accordance with the foregoing decision.

May 14, 1900, claimants notified the Bureau of Yards and Docks that they declined to execute the draft of supplemental agreement and reiterated the position taken in their letter of March 16, 1900, and submitted another proposition setting forth in detail other elements of expense which they desired should be considered and determined by said board.

June 8, 1900, the Bureau again by direction of the Department called upon the claimant to execute the agreement.

June 25, 1900, claimants informed the Chief of the Bureau that it declined to do so.

July 5, 1900, said letter was referred by the Bureau to the Navy Department.

September 18, 1900, the Navy Department returned

letter to claimants through the Bureau of Yards and Docks, stating that the form of supplemental agreement previously submitted was regarded as just and requested that claimants should execute it.

October 23, 1900, claimants again refused.

November 17, 1900, said letter was referred to the Navy Department.

November 20, 1900, the Department returned it to the Chief of Bureau and thereupon that officer forwarded it to the Commandant of the navy yard with directions to convene a board to consider and recommend whether or not the contract should not be annulled.

December 20, 1900, the board appointed in accordance with this recommendation, reported recommending that the contract be annulled.

January 2, 1901, the Secretary of the Navy annulled the contract in accordance with the report of the board.

January 8, 1901, claimants protested against the annulment (Finding XI, rec. pp. 35–38).

January 17, 1901, the United States published an advertisement inviting bids for the completion of the work and offering to the successful bidder free of charge the building material delivered at the yard by the claimants (Finding XII, rec. pp. 39, 40).

April 8, 1901, a contract was entered into between the lowest bidder, William N. Concanon, and the United States for completing the work for $54,472, with the stipulation that the new contractor was to have the use of the material supplied by the original contractor (par. 4 of specification, rec. p. 40).

During the progress of the work four supplemental agreements were entered into between Concanon and the United States (rec. pp. 40–45), of the following dates and to the following purport:

May 31, 1901, modifying par. 24 of the original speci-

fications of the contract of the claimant in this case (rec. pp. 10, 11), providing for a different cut-off for the piles and reducing the contractor's compensation in the sum of $2,781.31.

July 23, 1901 (rec. pp. 42, 43), increasing the contractor's compensation $127.60.

August 17, 1901 (rec. pp. 43, 44), providing for various changes and increasing the contractor's compensation $292.45.

October 31, 1901 (rec. pp. 44, 45), providing for various changes without any change in the compensation.

By Finding XIII (rec. p. 46), it is among other things found:

"Piles of greater length and larger dimensions were required at the second recommendation than would have been required at the first recommendation, and it would have been more difficult and expensive to drive them. There was no other item of increase in cost which would have made the cost of erecting the buildings at the second recommendation greater than at the first recommendation.

"Said second recommendation was a practicable and reasonable site upon which to erect a sawmill, boiler house, and steel chimney called for in the advertisement."

The claimants had delivered at Mare Island Navy Yard materials costing the claimants .	$16,688.97
For said materials the claimants received as partial payments under the contract . . .	15,434.32
Net loss	$1,254.65

(Finding XIV, rec. p. 46.)

Other losses sustained were as follows:

Pile driver, hoisting engine, and other tools used in driving test piles which claimant was not allowed to remove after forfeiture of the contract, but which were removed January 30, 1901.

Use and deterioration	$1,150.00
Freight in carrying said tools to Mare Island	36.31
Repairs to said tools	3.60
Total for use, deterioration, freight and repairs	$1,189.91

(Finding XV, rec. p. 47.)

Wages of workmen in and about delivery of materials and tools at Mare Island, and caring for the same	$545.41
Moving by direction of Civil Engineer Hollyday, lumber purchased by claimant and stored at said yard for use in the structures contemplated by the contract	51.00
Amount expended in and about testing soil under the two sites	598.15
Total	$1,194.56

(Finding XVI, rec. p. 47.)

The court found that no profits would have been realized if the contract had been carried out.

February 28, 1901, the United States brought an action in the United States Circuit Court for the Eastern District of Pennsylvania against claimants and the sureties on the contract, the American Surety Company of New York, Albert Brown and Thomas Prather. The American Surety Company was the only defendant upon whom process was served or who appeared. The president of the California Bridge and Construction Company appeared as a witness and testified in the suit. The action was to recover the difference between the price which the United States was compelled to pay for building the structures and the price which the claimant company had agreed upon for the work. The defense of the

Surety Company was based upon the alleged change in the contract by changing the site of the buildings to be erected.

November 15, 1906, the action was tried and the court submitted to the jury the question whether the United States could under the contract require the claimant to erect the structures at a site other than the first site. The jury brought in a verdict for the defendant surety company, and judgment was entered accordingly.

The Court of Claims held:

1. That the verdict and judgment in the suit in the U. S. Circuit Court for the Eastern District of Pennsylvania constituted no estoppel against the United States now claiming both in defense of this suit and in the maintenance of its counterclaim that the United States rightfully required the contractor to build on the second site.

2. That the United States was within its rights in demanding that claimants build upon the second site, and that the claimants committed a breach of the contract in not building thereon.

3. That the contract with Concanon being for work other than and different from that which the claimants had contracted to do, claimants were not liable for the excess cost of completion.

The court rendered judgment against the United States on its counterclaim and in favor of claimants, but only for the net loss for the material actually delivered on the site, $1,254.65, as shown by Finding XIV, rec. foot p. 46.

The opinion was delivered by Judge Atkinson and is contained in this record (pp. 48–57), and is reported (50 C. Cls. 40–65).

From this judgment the United States appealed and the claimants took a cross-appeal (rec. p. 58).

II. ASSIGNMENT OF ERRORS.

The appellant, California Bridge and Construction Company, hereby assigns the following errors in the proceedings and judgment of the Court of Claims:

1. That said court held that the proceedings, verdict and judgment in the suit brought by the United States in the United States Circuit Court for the Eastern District of Pennsylvania were not a conclusive adjudication in favor of claimants in this case that the contract was confined only to the first site selected and allowed the United States to relitigate that question; whereas said court should have held that the judgment of the United States Circuit Court for the Eastern District of Pennsylvania was a binding and conclusive determination which estopped the United States from asserting in this action, either by way of defense or counterclaim, that the United States had the right to require claimants to build on the second site.

2. That said court held that claimants, California Bridge and Construction Company, committed a breach of the contract in refusing to build on the second site selected by the government; whereas said court should have held that the appellant was not required to build on the second site, and that the United States committed a breach of the contract by requiring claimants to build on the second site.

3. That said court refused to allow claimants to recover for use, deterioration, freight and repairs of tools, amounting to $1,189.91, as found in Finding XV, rec. p. 47, and for wages of workmen, moving lumber, and amount expended in testing the soils under the two sites, amounting to $1,194.56, as found in Finding XVI, rec. p. 47; whereas said court should have allowed claimant all the items stated in said Findings XV and XVI, a total of

$2,384.47, in addition to the amount allowed by the judgment of the court.

4. That said court failed to find or allow the amounts claimed in the petition (p. 3) for "Time and expenses of officers and employees of claimant," there stated at $3,004.80, or for "General and office expenses of claimant chargeable to this contract," there stated at $1,068.50, and made no finding as to the amount of those items; whereas said court should have found what the expenses so claimed in the petition amounted to, and should have given judgment in favor of the claimant for the same in addition to the items previously stated.

III. BRIEF OF ARGUMENT.

The United States Estopped by Prior Suit.

The proceedings in the suit brought by the United States to recover damages for breach of this contract pleaded in the petition (rec. pp. 3, 4, and found in Finding XVIII, rec. pp. 47, 48) are conclusive that the breach of the contract was on the part of the United States and not on the part of this contractor.

This question is discussed at great length by the Court of Claims in its opinion (record from middle p. 50 to near end of p. 54), the opinion of the court being against the conclusiveness of the proceedings in that case in the present suit. This we assign as error and submit that the judgment in that case is conclusive on the merits of this.

Looking at the contract (rec. pp. 5–7), it will be seen that it is not in the usual form of one paper constituting the contract and signed only by the builder and the proper officer of the United States and of another instrument styled "the bond," signed by the sureties alone or jointly with the contractors, securing the final performance of

the principal contract. All four parties, one principal and three sureties signed and sealed the contract and are joint contractors with the United States. The United States, claiming that the contract was broken, regularly and properly brought its suit against all four parties to the contract. Only one, however, the American Surety Company, was served with process. The president of the California Bridge & Construction Company, however, appeared as a witness and testified in the suit, thus conclusively establishing notice to the principal contractor and participation of that contractor in the defense of the suit.

The defense of the surety company was based upon the action of the United States in changing the site: "The court submitted to the jury the question whether under the contract and circumstances attending its execution the United States could require claimants to erect the structures contemplated by the contract at a site other than the first site. The jury brought in a verdict for the defendant surety company and judgment was entered accordingly." (Finding XVIII, rec. p. 48.)

The issue thus submitted and decided, it will be seen, was applicable to the principal contractor as well as to the surety. The principal, though not served with process or regularly made a party, was notified of the pendency of the suit, and its highest officer appeared and participated in the defense.

If the judgment had been against the surety company for a recovery of damages, it would have been conclusive to fix the liability of the principal contractor, the claimant herein, in favor of the surety company in a suit brought by that company for exoneration. If the surety company had become insolvent or for any reason the United States had failed to collect the judgment from the surety company, the judgment would clearly have been

conclusive evidence in the event of the United States having had to sue the principal contractor, claimants herein, to recover damages for failure to build on the second site.

Now that the jury has found and the court adjudged that the contractor's obligation was to build on the first site only, and has rendered judgment in favor of the surety company on that ground, why is not the judgment conclusive in favor of the principal contractor, claimants herein?

The ground for defense was not one existing in respect of the surety as a party separate from the principal contractor. The defense was that the principal contractor, claimant herein, was not bound to build on the site which the government ultimately selected.

It seems absurd to say that in one suit one court may adjudge that the contractor was obligated to build only on the first site, while in another suit on the same contract another court is to adjudge that the obligation is to build on the second site.

It is true that the former action was one by the United States to recover damages from the contractors and their sureties and the present is by the contractors to recover damages from the United States, but that does not prevent the application of the principle of *res judicata*. The former suit settled finally that the American Surety Company owed nothing to the United States upon this contract bond, but it also settled much more. The principle of *res judicata* applies not only to the demand, but also to every fact or legal conclusion involved in the determination of the case. The best statement of this principle is in *Southern Pacific Company* v. *United States*, 168 U. S. 1, 48, as follows:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and

directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect to all matters properly put in issue and actually determined by them."

The " right " of the United States to require claimants to build at the second site was the very question put to the jury to decide. That right having been determined adversely to the United States, can not now be again asserted against privies to the former judgment. The " question " or " fact " was there determined for all time that the United States could not require claimants to build at the second site.

The case quoted was a bill in equity to quiet title to land. It appeared that in a prior suit between the parties as to other land similarly situated, the same questions of law and fact had arisen. It was held that the fact that the second suit concerned different land did not prevent the application of the principle of *res judicata*. The special issue upon which the determination of the first suit hinged was whether a certain map was a sufficiently definite and valid location of the railroad to pass title to the lands granted in aid of its construction. It had been held that the map was valid. The same defense being

raised in the second suit, the Supreme Court ruled that the validity of the map as a location of the railroad was *res judicata* and might not again be inquired into.

The principle for which we here contend was also clearly stated in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396, as follows:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* can not apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear."

This language is directly applicable to the present case. "The question upon which the recovery of the second demand depends" is whether the United States could rightfully require claimants to build at the second site. That question has "been previously concluded by a judgment between the parties or their privies."

The rule was also stated in *Forsyth* v. *Hammond*, 166 U. S. 506, 518, thus:

"Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

In that case, as in the present, the parties were reversed, the plaintiff in the first suit being defendant in

the second, but as the issue in each case depended upon the same question of law, that circumstance made no difference.

In *Deposit Bank* v. *Frankfort*, 191 U. S. 499, the city of Frankfort sued the bank for taxes. It appeared that by a statute passed some years before, called the Hewitt law, banks upon signifying their acceptance of the provisions of the act, should be taxed at a certain rate on their capital stock, and should be exempt from all other taxes. Later the statute was repealed. The law gave rise to much litigation, and after decisions the other way, it was finally held both by the State and Federal courts in suits between other parties that the Hewitt law was not a binding contract, which the legislature could not revoke. But before those decisions had been rendered, a bill in equity had been brought by the Deposit Bank, and an injunction had been granted it restraining the collection of the usual annual taxes. The determination of that suit in favor of the bank was set up as *res judicata*, and the Supreme Court adjudged it to be such, even though after the former adjudication between the parties the identical question had been finally decided otherwise between other parties. The court quoted with approval the passages hereinbefore quoted from *New Orleans* v. *Citizens' Bank* and *Southern Pacific R. R. Co.* v. *United States* (*ante*, p. 20), and continued (p. 514):

"The thing established by the Federal decree relied upon here was the binding and conclusive character of the contract embodied in the Hewitt law and its acceptance. That it was such a contract was then adjudicated, and, irrespective of the reasons given for the decision, must remain concluded until the judgment constituting such adjudication is modified or reversed."

So in the present case, the "thing established" by the former suit is that the United States could not require

claimants to build on the second site. That that is true is established as a conclusion of law for all time. Hence it can not now be denied, and claimants are entitled to their expenses of preparation.

In *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, it was held that where the right of a State to tax a railroad had once been judicially denied in a suit between privies, it might not again be set up; even though in the second suit the parties and the nature of the action were wholly different. So here, we contend that the right of the United States to require claimants to build on the second site, after being once judicially denied, may not be again set up.

Two earlier examples of the application of this principle, in the same volume of the reports, are *Aurora* v. *West*, 7 Wall. 82, and *Beloit* v. *Morgan*, 7 Wall. 619. Both were actions on municipal bonds, and in each the validity of other bonds of the same series, though not the identical ones, had been determined in prior suits between the parties or their privies. It was held that that determination made the validity of the bonds now in suit *res judicata*, as the question at issue was the same, though the subject-matter of the two suits might be different.

Other cases holding that every fact or question at issue and decided in a former suit is *res judicata* are *Thompson* v. *Roberts*, 24 How. 94; *Cromwell* v. *Sac County*, 94 U. S. 351; *Werlein* v. *New Orleans*, 177 U. S. 390; *Mitchell* v. *First National Bank*, 180 U. S. 471; *Fayerweather* v. *Ritch*, 195 U. S. 276; *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122; *Kessler* v. *Eldred*, 206 U. S. 285; *Nalle* v. *Oyster*, 230 U. S. 165.

Other cases applying in one form or another the principle of *res judicata* are *Young* v. *Black*, 7 Cranch, 565; *United States Bank* v. *Beverly*, 1 How. 134; *Lumber Co.*

v. *Buchtel*, 101 U. S. 638; *Last Chance Mining Co.* v. *Tyler Mining Co.* 157 U. S. 683; *United States* v. *California & Oregon Land Co.* 192 U. S. 355; *Brady* v. *Daly*, 175 U. S. 148; *Montezuma Canal Co.* v. *Smithville Canal Co.* 218 U. S. 371; *United States* v. *Harvey Steel Co.* 227 U. S. 165; *United States* v. *B. & O. R. R. Co.* 229 U. S. 244; *Calaf* v. *Calaf*, 232 U. S. 371.

That in order to ascertain exactly what was determined in the former suit, it is proper to examine the charge of the court to the jury, as we have done in the present case, appears from *Miles* v. *Caldwell*, 2 Wall. 35, where the Supreme Court examined the judge's charge for that very purpose. Said the court, speaking through Miller, J. (p. 39):

"It is a general rule, growing out of the concurrent jurisdiction of the courts of law and chancery over this subject, as well as a variety of others, founded also upon the principle that it is the interest of the public, that there should be some end to litigation, that when a matter has once been heard and determined in one court, it shall not be subject to reexamination in another court between the same parties. The defendant in this suit invokes the benefit of this rule as regards the question of fraud in the mortgage from Ely to Carswell and McClellan, and also as to the fact charged by him that the Gallagher mortgage had been fully satisfied, and was no longer of any force; alleging that both questions were submitted to the jury and decided against complainant in the action of ejectment the judgment in which is now sought to be enjoined. Of the fact of such submission and finding there can, in this case, be no doubt. Under the instructions of the court, which are in proof in this record, if the jury found either of these issues in favor of Caldwell, the plaintiff was not entitled to a verdict. The plaintiff, however, did get a verdict. It thus appears conclusively that the jury found that there was no fraud in the second mortgage, and that the first had been satisfied."

The undisputed rule, laid down by all authorities, is that a judgment binds parties and privies thereto. Who are parties and privies? One of the classic text writers thus defines them (1 Greenleaf on Evidence, § 523):

"*General Principle: Judgments bind Parties and Privies, but not Strangers.* * * * Under the term *parties*, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term *privity* denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest, and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

The foregoing definition was quoted with approval by the United States Circuit Court for New Jersey in *Pennington* v. *Hunt*, 20 Fed. Rep. 195, 196. The exact language of the author should be noted. He says that the reason why privies are bound is "that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded." Here there was a complete identity of interest between the American Surety Co. and the present claimants. If a judgment had been recovered against the Surety Company, claim-

ants would have been bound thereby if afterward sued either by the United States or by the Surety Company, as we shall shortly show by abundant citations of authority (*post*, pp. 28–32). Claimants had just as much interest in defending the suit in Philadelphia, even though not served, as did the Surety Company, for they could have been compelled to pay any judgment recovered therein. That they so realized at the time is indicated by the fact that they sent their president across the continent to testify in that suit.

A similar definition of privy is given in Bouvier's Law Dictionary, as follows:

"Privy. One who is a partaker, or has any part or interest in any action, matter or thing."

These claimants had a most direct and vital interest in the action in the Circuit Court.

That claimants and the Surety Company satisfy the test given by Greenleaf, of being identified in interest, appears from the circumstance that it was possible to make them both defendants in the same action, even though they were not both served. Defendants to a bill in equity may represent very diverse interests, and even be directly opposed to one another; but defendants in an action at law must of necessity be the same in interest, or there is a misjoinder. They must have been identified in interest and therefore in privity with one another, or they could not have been sued in the same action at law.

The present claimant and the Surety Company against which the former suit was brought and tried were respectively principal and surety and therefore, we contend, privies, either one of whom is bound by a judgment in a suit to which the other was a party. There have been a number of cases in which either a principal or surety has been held to be bound by a judgment against the

other, or able to take advantage of a judgment in favor of the other. These cases we now proceed to examine.

A case on this point is *Moses* v. *United States*, 166 U. S. 571. That was an action by the United States against Moses, surety on the official bond of Howgate, a disbursing officer. The trial court admitted in evidence against the surety, Moses, a judgment recovered by the United States in a prior suit against Howgate, the principal, for more than the penalty of the bond. This court held that there was no error in so doing, that the former judgment, unexplained, was sufficient evidence of the breach of the condition of the bond to charge the surety. This decision, by admitting a judgment against the principal, as evidence to bind the surety, shows that principal and surety are privies. Therefore, the present claimants, principals, and the American Surety Co., surety, are privies, and the decision in the former case must be held to have been rendered in a suit between the parties to the present suit or their privies.

The *Moses* case *supra*, held that a judgment in favor of the obligee against the principal, unexplained, bound a surety. To the same effect are the following authorities: *Drummond* v. *Prestman*, 12 Wheaton, 515; *Berger* v. *Williams*, 4 McLean, 577, Fed. case No. 1,341; *Union Guaranty & Trust Co.* v. *Robinson*, 79 Fed. Rep. 420; *Lowell* v. *Parker*, 10 Metcalf (Mass.) 309; *Willey* v. *Paulk*, 6 Conn. 74; Stearns on Suretyship, § 303.

In the foregoing cases, it was held that the surety was bound by a judgment against the principal. *A fortiori*, the converse is true and the principal is bound by a judgment against the surety. See *Hare* v. *Grant*, 77 N. C. 203; *Snider* v. *Greathouse*, 16 Ark. 72; *Bone* v. *Torrey*, 16 Ark. 83. In the first named case, a guardian who had given bond for the faithful performance of his trust was held concluded by a judgment recovered by the

infant against the surety. Such a decision could not have been reached if the principal and surety had not been regarded as privies.

Every contract of suretyship includes a contract of indemnity. The principal and surety are always in the relation of indemnitor and person to be indemnified. It has been held again and again, that the indemnitor is concluded by a judgment against the person to be indemnified. Said the Supreme Court in *Clark* v. *Carrington*, 7 Cranch, 308, 322:

"A judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity."

To the same effect, see *Lovejoy* v. *Murray*, 3 Wallace, 1; *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316; *Lawrence* v. *Stearns*, 79 Fed. Rep. 878; *Konitzky* v. *Meyer*, 49 N. Y. 571; *McFall* v. *Dempsy*, 43 Mo. App. 369; *Duffield* v. *Scott*, 3 Term Rep. 374, 377; *Jones* v. *Williams*, 7 Meeson & Welsby, 493; *Parker* v. *Lewis*, Law Reports, 8 Chancery, 1035, 1059.

The principle for which we have been contending is well stated in 23 Cyc. 1270, as follows:

"Where a person who is responsible over, either by operation of law or express contract, to another, has notice of a suit against the latter and an opportunity to appear and defend, the judgment rendered in the action, if obtained without fraud, will be conclusive on him, whether he appear or not."

The present claimant is seeking to take advantage of a judgment in favor of his privy. We have never heard in any statement of the rule as to parties and privies, that any distinction should be drawn between a person's being bound by a judgment against his privy and his taking

advantage of a judgment in favor of his privy. Nor does any reason appear why such a distinction should be made. And upon examination of the authorities we find that no such distinction ever has been drawn. The passage from the Cyclopaedia of Law and Procedure, which we just quoted, continues as follows (23 Cyc. 1270):

"And further the party secondarily liable may take advantage of an unsuccessful attempt to recover damages from the person primarily responsible, resulting in a judgment on the merits in the latter's favor."

The cases support this statement of the law. In *Featherston* v. *Newburg & Cohecton Turnpike Road*, 71 Hun (N. Y.), 109, 111, the Supreme Court of New York said:

"The relation between Shafer and the defendant was analogous to that of principal and agent, or principal and surety, or master and servant, and the rule in such cases is that a judgment in favor of the principal or the surety upon a ground equally applicable to both, should be accepted as conclusive against the plaintiff's right of action."

In *Hill* v. *Bain*, 15 R. I. 75, the analysis of the subject is so thorough and sound that we can not refrain from making an extended quotation. It was there said:

"Undoubtedly, the rule, as generally laid down, is, that judgments avail as estoppels only for or against parties and privies; but, nevertheless, the courts allow themselves a good deal of latitude in applying the rule, observing the spirit of it rather than the letter. Thus it has been held that a judgment in favor of a deputy sheriff, in an action against him for official misfeasance or default, is available by way of estoppel in an action against the sheriff for the same misfeasance or default. *King* v. *Chase*, 15 N. H. 9. So it has been held that a judgment in favor of a master in an action against him for the act of his servant, rendered in a trial of the case on its merits, is a bar to a suit against

the servant for the same act. *Emery* v. *Fowler*, 39 Me. 326. So it has been held that a judgment on the ground of payment against one of two joint and several makers of a promissory note is a bar to recovery against the other, whether as between the makers, the other signed as principal or surety. *Spencer et al.* v. *Dearth*, 43 Vt. 98. In *Bates* v. *Stanton*, 1 Duer, 79, 88, the plaintiff claiming to be the owner of certain goods delivered them to the defendant by way of bailment; the defendant afterwards surrendered them to the true owner, taking from him an indemnity bond. Thereupon, the plaintiff sued him in trover for their conversion, and it was held that a judgment recovered by the true owner, in an action against the plaintiff involving the right to the goods, was conclusive against the plaintiff in his action against the defendant, inasmuch, as the parties though nominally different were virtually the same on account of the interest which the true owner had in the defense of the later action by reason of the indemnity bond which he had given to the defendant of record. In *Atkinson* v. *White*, 60 Me. 396, the owner of a lot of logs mortgaged them to A., and then sold them to B. A. afterwards sold a portion of them to C., warranting their title. B. sued C. in trover for a conversion of the logs bought by him, and recovered judgment; C. setting up his title under A. In a later suit by C. against A., involving the same title, it was held that the judgment recovered by B. was a bar to recovery. See, also, *Durham* v. *Giles*, 52 Me. 206, and *Freer* v. *Stotenbur*, 2 Abb. Ct. App. Dec. 189.

"In these cases the defendants were permitted to avail themselves by way of estoppel of judgments to which they were neither parties nor privies. The ground on which this was permitted seems to have been that the defendants, though not parties to the judgments, were so connected in interest or liability with the parties that the judgments when recovered could be regarded as virtually recovered for them, for the purposes of estoppel, as well as by and for the parties of record. The Supreme Court of Maine in *Atkinson* v. *White*, *supra*, express an inclination to go even further, and to hold broadly that 'When a party has once tried a question in one suit, he shall not,

without regard to mutual estoppel, again try the same question involving the same testimony in another suit.' We think on the authority of these cases, it is competent for the defendant town to set up, by way of estoppel in the case at bar, the judgment recovered by the Budlongs."

In accordance with the doctrine laid down by the foregoing authorities, it is submitted that claimants, principals, may take advantage by way of estoppel, of the judgment in favor of their surety, the American Surety Co.

The question upon which the present case turns is whether the United States could require claimant, under the contract in suit and the circumstances attending its execution, to build upon the second site. Any right, question, or fact once determined by a court of competent jurisdiction can not again be drawn in question in a subsequent suit between the parties to the former suit or their privies. *Southern Pacific Co.* v. *United States*, 168 U. S. 1, 48. The question above stated upon which the present case turns, was determined against the United States in the case of *United States* v. *California Bridge & Construction Company*, No. 80, October session 1902, in the Circuit Court of the United States for the Eastern District of Pennsylvania. That the question there decided was the same as that here involved and that that determination must now control under the rule just stated, clearly appears from *Atlantic Dredging Co.* v. *United States*, 35 C. Cls. 463. The present claimant and the Surety Company, which alone was served in the former suit, were principal and surety, and in privity with one another. The rule laid down in the *Southern Pacific* case is therefore satisfied, and because of the prior adjudication between privies, it must be deemed settled and *res judicata* for the purposes of this case that claimants could not be required to build upon the second site. As they

were so required, and were not allowed to build upon the first site, they are now entitled to judgment for the expenses incurred by them in preparing to carry out the contract.

The First Site the One Selected.

We contend on the merits that the conclusion reached by the United States Circuit Court in the suit against the surety company was well founded, and that claimants could not be required to build upon the second site.

The language of the advertisement upon which the contract was based shows this. In a government contract, the advertisement, proposals and acceptance, which are preliminary steps required by law, are a part of the contract. *Garfielde* v. *United States*, 93 U. S. 242; *Harvey* v. *United States*, 105 U. S. 671, 688; *United States* v. *Mueller*, 113 U. S. 153. This advertisement, after inviting bids, says (rec. p. 28):

"Specifications and blank forms of proposals will be forwarded upon application to the Bureau or the commandant of the U. S. Navy Yard, Mare Island, Cal. Bidders are expected to fully inform themselves of the character of the work by visiting the navy yard, where plans may be examined and obtained."

Bidders could, and these claimants did, secure plans and specifications by mail (rec. pp. 28, 29, last par. Finding IV. The only possible object in a bidder's going to Mare Island was to inspect the site with reference to the nature of the soil, its distance from the landing place, roads thereto, etc. As shown by the invitation to bidders to visit the navy yard, the only object of which visit would have been to inspect the site, the contract contemplated the erection of a building on an ascertained site.

When the president of the claimant company went to Mare Island Navy Yard in response to the invitation of

this advertisement the following is what happened (Finding IV, rec. pp. 28, 29):

"In response to said advertisement, and before making any bid, Alfred W. Burrell, the president of the claimant company, a corporation organized under the laws of the State of California, and representing claimant, visited said navy yard with the view of making a bid for claimant company upon the proposed work. Said Burrell examined the plans and specifications, saw said map and blue print, and was shown by a duly authorized official at the navy yard the 'first recommendation' of the proposed work. He was informed at the time by said official that the site of said structure was not definitely fixed; that the location indicated by certain stakes, which were pointed out to him, had been recommended, but that the recommendation had not been approved by the Navy Department; and that the location was liable to be changed to some other place within the limits of the navy yard.

"At request of claimant company, Civil Engineer Hollyday on November 3, 1898, sent claimant a set of specifications and blue prints numbered B-216 to B-223, and a receipt for same to be signed and returned. Said receipt stated that the plans and specifications and two sets of blank forms were received for the purpose of making proposal for erecting a sawmill, boiler house, and steel chimney. In his letter transmitting same no mention was made by said civil engineer that the site for the buildings was undetermined or liable to change."

What was contained in the blue print is shown by Finding II (rec. pp. 27, 28) as follows:

"At some time between October 29, 1898, and the date of claimant's bid (November 19, 1898) a map and blue print had been made and were on file with plans and specifications in the office of the civil engineer at the navy yard for the examination of bidders. Upon this blue print was indicated by appropriate marks the 'first recommendation' of the proposed structure, and into the ground at said 'first recommendation' stakes were driven at

points where would be the corners of said building if erected at that place."

These stakes clearly constituted a representation of the site of the building.

In *United States* v. *Gibbons*, 109 U. S. 200, there was a contract between the parties for rebuilding a burned shop at the Norfolk Navy Yard. The advertisement, as in the present case, contained an invitation to "visit the yard and examine the present condition of the works" (p. 201). The specifications provided:

"The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated in the plan by new work."

Claimant visited the yard and saw the burned shop which was pointed out to him by officers whose authority to do so was afterwards denied. He put in his bid and was awarded the contract. After he had started work he was required to take down and rebuild a large part of the standing walls. He brought suit for the expense of so doing. He was held entitled to recover. This court said (109 U. S. 204):

"Under the circumstances in the present case, and according to the terms of the specifications, we think it was the duty of the officers acting for the United States, the right performance of which the government assumed, to point out to the bidders the parts of the foundations and walls which were in fact so far uninjured as to enter into the new structure, and that this was actually done by dismantling and stripping the burnt building, so that upon inspection of what was left standing the proposing contractor would be able by measurement to ascertain precisely what new work he was to do and be paid for. To require him to determine the fact for himself pro-

visionally, subject at any time before completion of the work to have his judgment reversed, and to be required in consequence to perform work which he could not and did not provide for in his estimates, would be unreasonable and unjust. The inspection invited by the advertisement was not for the purpose of assisting the contractor to determine subject to such a condition the question of the fitness of the standing walls to remain, but was, as we think, that he might see as part of the plan of the work what the authorized agents of the United States had designated as intended to remain in the permanent structure. It was the duty of the United States to point out the work deemed to be sufficiently uninjured to remain, and this was performed by allowing it to stand, and by not directing it to be taken down. We lay no stress, as the Court of Claims did not, on what was said at the time to that effect by unauthorized subordinates. The foundation and walls themselves, as left standing by authority of the proper officers, constituted under the circumstances a representation on the part of the United States that they had been adjudged to be so far uninjured by fire that they were to remain, upon the faith of which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done."

The case is precisely in point. It was the duty of the officers acting for the United States to point out, in the former case, what walls were fit to remain in the new structure; in this present case, what was the site for the building. This court said that it would be "unreasonable and unjust" to require the contractor to determine for himself provisionally what walls were to be left, with his determination subject to reversal at any time. It would be equally unreasonable and unjust to require the present contractor to bid upon a site determined only provisionally, subject to be changed by the government officers at any time.

This court in the *Gibbons* case refused to give any effect to oral statements contradicting representations made by the structures on the ground.

The Court of Claims has found (Finding IV, p. 28) that Burrell, claimants' president, was told when he visited the navy yard before submitting his bid, that the first recommendation, then pointed out to him, was liable to change. But how long might the United States retain its right to make such a change? Surely not indefinitely. Defendants' right of choice could not last forever. Paragraph 7 of the specifications (rec. p. 8) is as follows:

"7. Time of commencement of work.—The contractor shall commence the work within twenty days from the date of the signing of the contract and continue without interruption. The entire work to be completed in six calendar months from the date of contract."

Claimants were by the above paragraph of the specifications required to begin work within twenty days after the signature of the contract, and were entitled as a matter of right to begin at once. Hence even if the contract permitted the United States to select any site at the navy yard, that right had to be exercised not later than the date when both parties executed the contract, December 21, 1898, because on that date claimants were entitled to proceed. On that date stakes were in place at the first site and at no other, thereby indicating that that was the choice of the defendants. It is true that claimants' president was told prior to submitting his bid that there might be a change from that site, but no such change was up to the time of bidding or of signing the contract communicated to him. Whatever right to change the site the government may previously have had was then lost by failure to act. The government's right of election was then exercised, and it was

not entitled to a second choice. On this ground, if on no other, it must be held that claimants could not be required to build on the second site and are therefore entitled to judgment.

That the foregoing position is sound appears from *United States* v. *Freel*, 186 U. S. 309. That was a case in which the contract expressly gave the government the right to select any site. It said that the dry dock to be built was (p. 311) "to be located at such place on the water-line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part." But in spite of the foregoing, the court held that the surety was released when the government and the contractor changed the location from that staked out at the time of the contract and upon which work had been begun. That can only mean that the right of election which the government undoubtedly had in the first place had been lost through the staking out of the site and the beginning work at the first location; that that constituted an election.

We contend that from and after its execution, the contract contemplated a fixed and definite site. That the site is not expressly named in the contract itself is of very slight significance in deciding whether this is so. Every written contract is by itself a mere sheet of paper which must be connected with the object to which it relates by parol evidence. If a man buys a chair or a piano, or anything else, the contract of sale usually describes the article merely as "one desk-chair," or "one Steinway piano," but it does not follow that the vendor can deliver any desk-chair or any Steinway piano he sees fit. The circumstances surrounding the parties may be looked into to identify the particular desk-chair or piano they had in mind and only that particular object may be delivered by the vendor, not any one answering the description in the contract. Evidence outside of the contract itself may

always be adduced to identifyi s subject-matter. This principle was stated and applied to an extreme case in *United States* v. *Peck*, 102 U. S. 64, affirming 14 C. Cls. 84. That was a contract for furnishing hay for the use of a military post in the far west. The contract made no mention of the source from which claimant was to get the hay, but it was proved by parol evidence that both parties contemplated that he should cut it at Big Meadows, which was, in fact, the only available supply. What claimant complained of was that the government had prevented him from fulfilling his contract by procuring other parties to cut the hay there. This court, affirming the decision of the Court of Claims, held that it was entirely proper to admit parol evidence to show that the subject-matter was a particular lot of hay and that both parties contemplated that the contract should apply to that lot and no other. Said the Court of Claims (14 C. Cls. 111):

"We are of opinion that the facts which we have recited must be taken into consideration in construing this contract, and that they establish that it was a contract for cutting and delivering that particular hay."

Claimant was therefore allowed to recover even though the written contract gave him no right whatever to that particular hay.

But another case much more directly in point is *Smith* v. *Salt Lake City*, 83 Fed. Rep. 784, 104 Fed. Rep. 457. That was a suit upon a contract for the construction of an aqueduct providing unit prices for different sorts of work. Defendants claimed the right to change the location and character of the work provided it still paid the unit prices. As in the present case, no location seems to have been stated in the contract. The court said in language directly applicable to the present case (83 Fed. Rep. 787):

"However, it is not necessary to discuss at length the evidence on this point, because the contract will be found to settle the question. As stated before, the city invited proposals for building the aqueduct according to plans and specifications in the office of the city engineer, and the contract is that the work shall be done in conformity with the plans and specifications. In this a survey and location of the line in all parts is assumed, inasmuch as plans and specifications can not be made without such survey and location. Upon the contract alone, without referring to the oral testimony, we must assume that the line of the aqueduct on the side of the cañon, as well as that on the other parts of the line, was surveyed and located before the contract with De Bois and Williams was made. *Delafield* v. *Village of Westfield* 28 N. Y. Supp. 440, 77 Hun, 124; *Sexton* v. *City of Chicago*, 107 Ill. 324."

This is exactly what we contend here, that the contract assumes a definite location, even though one is not expressly mentioned.

In the Circuit Court of Appeals, the decision below was affirmed. The court said (104 Fed. 466):

"The dry words and broad stipulations of contracts must be read and interpreted in the light of reason and of the subject contemplated by the parties."

On the authority of that case it should be held that the present contract contemplated a definite site, namely the first site.

Specifications Would Not Fit Second Site.

Even if the site first selected was not definitely fixed by the representations made by the stakes, the government was at all events bound by the specifications upon which the work was advertised and which later became a part of the contract.

These specifications definitely prescribed the penetra-

tion for the piling (par. 24, rec. pp. 10, 11). Even if the first site with reference to which these specifications were evidently drawn was not definitely selected as the site, the government was at least bound to select a site which was consistent with the specifications; and if the specifications would not fit the site ultimately selected then there was a departure from the contract.

In its protest against a change of site, dated May 10, 1899, set forth in full in Finding X, rec. pp. 32–34, it was stated that much longer piles would be required at the second site than at the first (near foot p. 33), and that there was much risk of the stability of the structures even with the increased length of piles (rec. p. 34). Finding XI says (rec. p. 35):

"On June 24, 1899, the civil engineer notified claimant that the specification for diameter of piles was waived and gave the contractor the penetration of piles for each particular case as determined by him."

The expression "the specification for diameter of piles was waived" would in form tend to indicate that the contractor was relieved of some of the strictness of the obligations of his contract. In point of fact it was an arbitrary substitution by one party, without the consent of the other, of a new standard for piles in place of that stated in the contract. The supposed waiver was really a requirement of much longer piles which being in the soft soil of the second site could not be driven to the refusal called for by the specifications (par. 24, rec. foot p. 10). Far from being any concession to the contractor, it was placing upon him a most onerous burden by requiring him to secure piles which with the increased length would have to be thicker than those called for by the specifications; and at the same time by relieving him of the requirement to drive them to refusal as defined by

this paragraph, would, by permitting them to be driven to a point less then refusal, place upon the contractor the hazard of a lack of stability in construction.

The finding of the Court of Claims is (Finding XIII, rec. p. 46):

"Piles of greater length and larger dimensions were required at the second recommendation than would have been required at the first recommendation, and it would have been more difficult and expensive to drive them."

The court does not expressly find that it would require piles of greater length and larger dimensions than were specified in par. 24 (rec. foot p. 10). That fact does, however, very clearly appear from the proceedings under the subsequent contract.

That contract was entered into April 8, 1901 (Finding XII, rec. pp. 39, 40). The following month, however, a supplemental agreement was entered into which radically changed the terms of par. 24 of the original specifications (rec. p. 10). The original specification provided (rec. near foot p. 10) that the piles "are to be 8 to 10 inches at small end and 14 to 18 inches at the butt." The new specifications under which the work was actually done provided (par. 1, p. 40), "they are to be not less than six inches at the small end and twelve inches at the large end; ". This provision while fixing the minimum thickness apparently to be less than that fixed by the original contract with this claimant carefully avoids fixing the maximum thickness at either end as did the original specifications.

The specifications of the claimant's contract provide (near foot p. 10):

"They are to be of sufficient length so that when driven the penetration shall not exceed an average of ½ inch per blow for the last five blows of a hammer weighing 3,000 pounds falling 20 feet, or the equivalent thereof."

The new specifications drawn with reference to the second site provide (foot p. 40 and top p. 41):

"they are to have sufficient length so that when driven the penetration shall not exceed an average per blow for the last five blows of a hammer weighing 3,000 pounds falling 20 feet, or equivalent thereof, as shown on the following table and to have a length not less than that shown on the following table:"

"The following table" (rec. p. 41) shows a separate requirement for each of the sixty-three piers, both for average penetration for the last five blows and for minimum length of cut-off, whereas the original specifications of the contract of this claimant (par. 24, rec. foot p. 10) contained a uniform provision for the amount of penetration "for the last five blows of a hammer" and no specific requirements as to length. As the court expressly found that both the length and the other dimensions would have to be greater at the second site (Finding XIII, p. 46), it is quite clear that this supplemental agreement (rec. pp. 40, 41) was entered into because the original specifications would not fit the second site.

It therefore appears that even if the original site was not absolutely required by the contract with the claimant, the government did, at all events, agree by the contract to select a sight consistent with the specifications; and the second site was not consistent with them. For this reason the government broke the contract by changing to a site never contemplated by either itself or the contractor when the specifications were originally prepared.

Government Delayed Notification of Length of Piles.

Another ground on which the contractor was clearly relieved from all obligation for a further performance of

the contract was that the government delayed notifying the contractor as to the length of piles required until after the entire contract time had elapsed.

The contract was dated December 21, 1898 (rec. p. 5). The contractor was required to commence the work within twenty days from the date of signing the contract and continue without interruption and to complete it within six months from the date of the contract. The contractor, on January 18, 1899, notified the engineer of the United States that he had commenced work under the contract in order to comply with the specifications. Not until March 1, 1899, was the contractor notified by the engineer that the site had been selected (Finding VI, last par. p. 30), and even then he does not seem to have been told what that site was. On the next day, March 2, 1899, the contractor made inquiry (p. 30)—"will you kindly inform us whether the original site was finally decided upon, and if not, what the new location is?" Not until June 24, 1899, did the civil engineer of the United States notify claimants that the specification for diameter of piles was waived and give the contractor the penetration of piles for each particular case as determined by him. (Finding XI, rec. p. 35.) But this was after the entire contract time had expired. The specifications for piling were, as we have seen, inapplicable to the site ultimately selected by the government. If the contractor was required to build on the second site he had to have some directions as to the penetration to be reached by the piling and the diameter of the piles.

If the contractor had waited until his entire contract time was up before he began work, there would be no question that a breach of the contract would have been committed, which would have warranted the government in annulling the contract. Can there be any doubt on that point when it was the government that delayed to

notify the contractor as to diameter and penetration of the piles until the entire contract time was over?

It must be remembered too, all this occurred during a period within which the price of all building material was rising enormously. True, the findings say nothing of this, but it is a fact of which the court will take judicial notice. In the report of the Chief of Engineers of the Army, forming a part of the annual report of the War Department for 1902, it is said (Part III, p. 1903):

"This increase in estimate over original estimate is principally due to increase in market values in labor and material since 1897. For instance: In 1897 for such work oak lumber could be purchased for $17 per M. feet B.M., to-day the price is $25 to $30; then hemlock could be had for $10 to $12, now $16 to $18; iron bolts were worth about $1 in 1897, now $1.50 or more; and other materials have enhanced in value proportionately. Portland cement being one of the few articles which can be had for less money to-day than five years ago. Along with materials the cost of labor has also increased, and the same grade of labor which could then be had for $1.50 is now dictating its terms at $1.75 and $2."

The government can not fail to give directions as to the length of piles for an unreasonable time and then penalize the contractor as in default.

Counterclaim Can Not Be Maintained.

The United States filed a counterclaim praying judgment against the claimants in the sum of $35,607.32 (rec. pp. 20–21) for excess cost to the United States of finishing the work and liquidated damages for delay. The Court of Claims dismissed the counterclaim (rec. p. 58). If the preceding contentions of this brief are correct, if the prior suit in the Circuit Court renders this *res judicata*, or if the United States and not claimants broke the contract then of course there can be no recovery on the counter-

claim. But even if the preceding contention be not sustained, the counterclaim must be dismissed on the ground taken by the Court of Claims, that the work was different under the new contract with Concanon from what it was under the old with present claimants. The court on this head said (rec. p. 57):

"We allow nothing on account of the defendant's counterclaim because we think that the changes in the specifications made by the subsequent contracts with Concanon resulted in material and substantial alterations in the work which claimant had undertaken to perform. In other words, that the government after notifying the claimant of its purpose to have the work done and hold claimant for the difference between what it would cost the defendants and the original contract price did not complete the work in substantial compliance with the original plans but changed them in material features. The right secured by the original contract to make changes in the specifications and providing for a method of ascertaining the compensation to be paid in event of changes should not be extended into the new arrangement so far as the rights of the original contractor are concerned. When the government took over the work and let a new contract, its rights and those of the original contractor were fixed by the law applicable to the rights and liabilities then existing. The government could then sue for a breach of the contract or could have the work done and charge the contractor for the cost in excess of the original contract price. But in electing to do the latter the government must show that the work was done by another contractor under a contract and specifications which did not materially or substantially depart from the old contract and specifications. To allow the government under the provisions of the original contract or specifications the right to make material changes in the specifications resulting in substantial alterations of the buildings as originally contemplated, would be in effect to say that any sort of changes or alterations could be made after the declared breach. (*Axman's* Case, 234 U. S. 36; *McMullen's* Case, 222 U. S. 460; *O'Brien's* Case, 220 U. S. 321)."

An examination of Finding XII (rec. pp. 39–45) fully supports the conclusion of the Court of Claims on this point. True, the advertisement and specifications on which the contract was relet purported to follow those of the claimant company. Concanon, however, made his bid with reference to the second site (foot p. 45). The bid of this claimant was made either with reference to the first site, if our contentions are well founded, or with reference to an unknown site if the theory of the government adopted by the Court of Claims is correct.

Par. 24 of the specifications of the contract with the California Bridge & Construction Company (pp. 10, 11) forms a part of Concanon's contract. It had become entirely evident during the performance of the California Bridge & Construction Company's contract that those specifications were inapplicable to the second site. The contract was, however, let to Concanon on the same specifications evidently for the purpose of bringing this very counterclaim against the California Bridge & Construction Company. Hardly had Concanon's contract been entered into before a supplemental contract was made containing a radical modification of par. 24 of the previous specifications (rec. pp. 40, 41). This change was evidently made because the specifications of the claimants were clearly inapplicable to the second site, and Concanon could not build on that site without this paragraph of the specifications being modified. This shows that from the start there was no intention of building on the claimant's specifications.

Besides that already referred to there were three other supplemental contracts made between the United States and Concanon changing the work done from that required by the original contract between claimants and defendants (rec. pp. 42–45). It was entirely proper for the United States and Concanon to agree on changes, but the

cost of the work so changed ceased to be an accurate measure of defendants' damages because of the supposed default of claimants. Nor is it correct to say that these four supplemental contracts made no material alterations in the work. The first (p. 40) changed the size and required penetration of every pile under the building; in other words, made a complete change in the foundation. Measured in money, the change diminished by $2,781.31 the compensation on a contract for $54,472 (p. 39), a reduction of 5%. Neither in amount nor in proportion to the whole of the contract is such a change immaterial and unsubstantial.

The second supplemental contract (p. 42) was a further change in the foundation made necessary by a mathematical error in the first. In money it amounted to $127.60, not a large sum, but too much to be called immaterial.

The third supplemental contract (p. 43) increased the compensation $292.45; but the changes were greater than the sum would indicate, for it was a balance struck between certain changes increasing the cost and another diminishing it.

The fourth supplemental contract (p. 44) provided:

"That the party of the first part shall be permitted to and shall provide an opening, to be closed with steel doors, in the wall separating the shavings room from boiler room in the sawmill being constructed under the the aforesaid contract; change the position of the stairways leading to and from the boiler room, provide a foundation for the bulkhead wall to separate the engine from the boilers; omit the south wall of the toolroom."

These changes, while they did not alter the amount of compensation, are substantial modifications of the arrangements of the rooms mentioned.

It is thoroughly settled by decisions of this and other

courts that where the owner seeks after annulment to charge the contractor with the expense of completing the work he must in fact complete the work exactly the same as the first contractor was bound to do. If he makes a new contract it must be exactly the same as the first contract, with the same plans and specifications. If the owner wants the work done differently, or under different conditions, he is at liberty so to provide, but the expense of completion then ceases to be an accurate measure of his loss, because it is the expense of completion in a different manner.

In *United States* v. *Axman*, 234 U. S. 36, the point in decision is thus accurately stated in the syllabus:

"Where, after default of the original contractor, the contract is relet, the original contractor is not bound for difference unless the contract as relet is the same as the original contract."

Other cases to the same effect are *Chesapeake Transit Co.* v. *Walker*, 158 Fed. 850; *United States* v. *Weisberger*, 206 Fed. 641, 645; *Mundy* v. *United States*, 35 C. Cls. 265. See also *American Surety Co.* v. *Woods*, 105 Fed. 741, where it was held under a contract authorizing annulment and completion at the expense of the contractor that where the works were never in fact finished by the owner after the default of the first contractor, he might not recover the excess which it would have cost him to finish them.

The claim for liquidated per diem damages for delay in completion can not be sustained. The contractor was required by the specifications (par. 7, rec. p. 8), to commence work within 20 days from the date of the contract and was to complete it in six months from that date. The contract was dated December 21, 1898 (rec. p. 5).

The contractor was not notified until March 1, 1899, that the new site had been selected. Even then the notice was so indefinite that he asked the next day, March 2, 1899, "what the new location is?" (end of Finding VI, rec. p. 30). The contractor thus not having been allowed to begin on time can not be held liable for delay in completion. The obligation to complete within six months was dependent upon opportunity being given to the contractor to start within twenty days. No new date of completion can be substituted. *United States* v. *United Engineering and Contracting Co.* 234 U. S. 236, 242.

Hence it is clear that the judgment of the Court of Claims is correct in holding that there can be no recovery on the counterclaim, even if the contract was validly forfeited.

Conclusion.

We therefore ask that the judgment of the Court of Claims be affirmed for the amount already rendered, $1,254.65 (Finding XIV, rec. foot p. 46), and remanded with directions to allow in addition $1,189.91 (Finding XV, top p. 47), and $1,194.56 (Finding XVI, middle p. 47), besides a fair allowance for the general or overhead expenses. This last is in accordance with the rule of damages laid down by this court in *United States* v. *Behan*, 110 U. S. 338, which allows a recovery, in a case of a contract erroneously put an end to, for the time and services of the claimant himself, or, what is the same thing, the time and services of the officers of a corporation. This point is stated in the following sentence (pp. 345, 346):

"It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been dam-

aged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract."

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